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Supreme Court, U.S.
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In the Supreme Court of the United States

CONNIE C. RESHARD,

PETITIONER,

VERSUS

MAIN LINE HOSPITALS INCORPORATED d.b.a./a.k.a., MAIN LINE HEALTH AND THE LANKENAU HOSPITAL, DR. MICHAEL J. GLASSNER, DR. JOHN F. SCHILLING, MARK E. SCOTT, D.O., DR. KIMBERLY M. LENHARDT, DR. THOMAS J. MEYER, PULMONOLOGY ASSOCIATES, INC., AND DR. GEOFFREY P. TREMBLAY,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

i. Whether Rule 41(b), Fed. R. Civ. P. dismissal for failure to prosecute is reversible, in part, due to errors committed under Rule 26(b)(1) and (2), *et seq.* and due to inconsistent standards.

ii. Whether the same standards for a lay *pro se* litigant should be applied to an attorney *pro se* litigant.

iii. Whether the court erred by denying motion for default judgment and the striking of pleadings because the defendants deliberately failed to file timely answers to the Complaint.

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JURISDICTION

On November 29, 2007, the United States Court of Appeals for the Third Circuit (Hereinafter "Third Circuit") issued an Order affirming the district court dismissal with prejudice for failing to prosecute under Rule 41(b), Fed. R. Civ. P., C.A., No. 06-3170. (App.-1). On February 13, 2008, the Third Circuit sitting *en banc* denied the petition for rehearing. (App.-6). The Third Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court may entertain jurisdiction of a final order of the United States Court of Appeals pursuant to Section 1254 of Title 28 of the United State Code.

I. COURSE OF PROCEEDINGS

Petitioner filed this lawsuit in the United States District Court for the Eastern District of Pennsylvania on April 2, 2002 under the diversity of citizenship jurisdiction, 28 U.S.C. § 1332, requesting monetary damages from the named respondents listed in the style of the case. The United States District Court for the Eastern District of Pennsylvania (Hereinafter "District Court") dismissed the case for failure to prosecute under Rule 41(b), Fed. R. Civ. P., on April 28, 2006, Civil Case No. 02 cv1787. (App.-8). The District Court denied the motion for reconsideration on May 26, 2006.

After timely service of the Complaint and Summons and the Amended Complaint, Dr. Michael Glassner, a Gynecologist (Hereinafter, Dr. Glassner"), Dr. Thomas Meyer, a Pulmonologist (Hereinafter "Dr. Meyer"), Dr. Geoffrey Tremblay, a Cardiologist (Hereinafter, "Dr. Tremblay"), Dr. John Schilling, an Intervention Radiologist (Hereinafter, "Dr. Schilling") and Dr. Mark Scott, an Intervention Radiologist (Hereinafter, "Dr. Scott"), none of the parties filed a timely Answer or a Rule 12(b), Fed. R. Civ. P. Motion within 20 days. Counsel for Dr. Glassner, Dr. Meyer and Dr. Tremblay entered appearances. Each of the defendants (excluding Dr. John Schilling and Dr. Mark Scott) in the case sought to begin discovery without a stipulation of the parties and without district court approval under Rule 26(d), Fed. R. Civ. P. None of them filed a

timely Answer, except Dr. Kimberly Lenhardt (Hereinafter, "Dr. Lenhardt") and Lankenau Hospital (Hereinafter, "Hospital") filed timely Rule 12(b), Fed. R. Civ. P. motions. Petitioner served on August 20, 2002 a motion for default judgment against all of the parties except Dr. Lenhardt and the Hospital. The respondents made various filings after the motion for default. Senior District Court Judge Robert E. Kelly denied the motion on September 13, 2002. *App.*at *21-23.*

All of the parties were allowed to file an Answer. Dr. Michael Glassner filed a Rule 12(b) motion to dismiss and for a more definite statement. The District Court denied the Rule 12(b) motions filed by Dr. Glassner, Dr. Lenhardt and the Hospital on October 21, 2002. The remaining parties filed a timely Answer except Dr. Lenhardt and the Hospital filed their Answer and a motion for summary judgment under Rule 56(B) Fed. R. Civ. P. on December 3, 2002. Dr. Geoffrey Tremblay also filed a motion for summary judgment under Rule 56(B). The district court also set discovery to end by March 31, 2003, but did not hold a conference with the parties first under Rule 26(f), Fed. R. Civ. P. Also, the Hospital and Dr. Lenhardt moved to compel discovery on December 20, 2002 regarding unauthorized discovery request under Rule 26(d), commenced in August 2002 that exceeded the scope of initial disclosures under Rule 26(a)(1).

On January 24, 2003, Judge Kelly held a status conference, noting that petitioner is an attorney. Subsequently, the court also granted petitioner's motion to extend the discovery timeline. All parties served discovery requests including a

request for petitioner's deposition. Petitioner served a request to depose Dr. Lenhardt's in February 2002. Neither deposition was held as scheduled. Petitioner had chest pains and was admitted to a local DC hospital. The respondents did not want to hold Dr. Lenhardt's deposition in the jurisdiction of her residence, Northern Virginia. The district court re-scheduled depositions for Dr. Lenhardt on March 13, 2003 (but district court on March 18, 2003, set it for March 20, 2003 in Philadelphia) and for petitioner on March 31, 2003 in Philadelphia. Petitioner filed on March 25, 2003, a motion for co-counsel to represent her at her deposition and the district court denied it on March 27, 2003. Petitioner filed a motion on March 28, 2003 for Hughie Hunt to appear *pro hac vice*. The district court refused to consider it in time for the deposition. Petitioner filed a notice of appeal on March 31, 2003, C.A. No. 1899. Petitioner appeared for her deposition but did not answer questions without an attorney to represent her.

Petitioner had previously filed a petition for writ of mandamus with the Third Circuit (C.A. No. 03-1623 on March 5, 2003) that would be denied on May 6, 2003. Both sides (regarding discovery) filed various other motions. In response to a motion for recusal by petitioner, Senior Judge Kelly recused himself on April 16, 2003. All respondents filed a series of motions regarding a protective order and motions for summary judgment. Subsequently, the case was reassigned on April 22, 2003 to Judge R. Barclay Surrick. On October 15, 2003, Judge Surrick dismissed without prejudice most of the pending motions on both sides and scheduled a hearing for November 24, 2003. At that hearing, Judge Surrick

discussed issues on whether petitioner could have an attorney despite the fact that the appeal was pending in the Third Circuit on that issue. Judge Surrick would also require that petitioner provide a certificate of merit despite the fact that petitioner's medical records were both incomplete and otherwise modified.

On November 26, 2003, Judge Surrick ordered petitioner to inspect the medical files at Lankenau Hospital by December 9, 2003 despite petitioner's protest that electronic discovery could not be conducted under such a short window. *App.* at 19-20. None of the preliminary discovery necessary before an inspection process could begin had been completed by the Hospital and the timeline was impossible to undertake the task. Judge Surrick's order stated that there was no discretion. Petitioner filed on February 9, 2004, a companion appeal with the Third Circuit, C.A. No. 04-1273. Judge Surrick held a hearing on February 20, 2004 and he indicated according to the hearing transcript that he would hold another status hearing before taking any further action. Petitioner did not attend the February 20 hearing. The Third Circuit denied both pending appeals on November 16, 2004. Judge Surrick elected not to hold a subsequent status hearing and filed an order dismissing the case on April 28, 2006, under Rule 41(b) and a companion local rule.

II. STATEMENT OF FACTS

On April 4, 2000, the plaintiff entered Lankenau Hospital's ambulatory facility for a transvaginal myomectomy. The surgery was incomplete and the patient suffered major life threatening complications, requiring admission for further observation.

Petitioner was told during recovery that there were complications involving blood loss leading to transfusion of two pints of blood and that she would be admitted for observation. The patient had debilitating pain. Later that same day the patient was given an experimental procedure, uterine artery embolization including the unauthorized embolization of her right ovary. There was no valid informed consent for the procedure. None of her physicians advised her of the ovary embolization or that her ovary embolization was intentional. *See Generally, Complaint as amended.*

The plaintiff was not adequately monitored. On April 6, 2000, the nurses ignored the patient during chest pain and acute breathing distress. Her caregivers told her that she was disturbing other people, to shut up and breath through her nose. At that time, blood clots were traveling through her veins, her heart and finally into her lungs. No doctor examined her or did any follow-up communication. Impaired breathing was noticeable thereafter but ignored by all of her caregivers. *See Generally, Complaint as amended.*

Two days later on April 8, 2000 the patient had another clot. Her condition grew worse. The patient was being released on April 8, 2000, but she

telephoned Dr. Glassner complaining that there had to be something wrong with her because she had pain, heavy breathing and was too sick to go home. A resident doctor of Asian descent came to see her shortly afterward the telephone conversation with Dr. Glassner, learned that she would stay in the hospital another day and left petitioner without communication or examination. After near collapse later on April 8, 2000, the patient was placed on oxygen therapy that night but no doctor attended to her all night. *See Generally, Complaint as amended.*

On the morning of April 9, 2000, the same resident doctor of Asian descent completed a discharge form, gave her several prescriptions and told the patient that there was nothing wrong with her. Until April 9, 2000, none of her physicians saw her and Dr. Glassner and Dr. Schilling never actually examined the patient, only resident doctors. A CT Scan of the chest revealed multiple large clots in both lungs, although the patient was told she had pulmonary embolus, one clot. Apparently, the blood clots were caused by the embolization procedure but the medical record does not reflect the origin and location of the clots. Dr. John Schilling who performed the embolization also inserted a permanent Greenfield filter in the patient's inferior vena cava on April 10, 2000. *See Generally, Complaint as amended.*

The patient spent April 9-12, 2000 in an intensive care unit, was given intravenous blood thinners, Heparin, was given 5 pints of blood consecutively on the 9th, and was given oral blood thinner, Coumadin thereafter. Because of blood pressure issues as a result of the pulmonary emboli,

the patient began what has become a lifetime requirement of calcium blockers for systemic and secondary pulmonary hypertension as well as regurgitating mitral, aortic and bicuspid valves. From April 12th- 18th the patient was in a cardiac monitoring floor. She left the Hospital on discharge with a blood stream infection and a temperature of 103 degrees Fahrenheit. *See Generally, Complaint as amended.*

The patient continued taking various narcotics for pain for several months and anticoagulation drugs for over a year. On April 22, 2000, the patient entered a local hospital in Washington, DC for further treatment for several weeks and spent several weeks with at home nurse care with varied intravenous medications. While hospitalized in Washington during this period, she was said to have a partially collapsed lung, cardio-pulmonary issues including partial pulmonary infarction and blood stream infection. The transvaginal myomectomy was completed on May 31, 2000 at a hospital in Washington, DC. The patient endures permanent impairment as previously noted as well as premature, complete loss of ovary function and other permanent impairment not to mention pain and suffering. *Complaint as amended.*

The patient, a 52-year old female entered Lankenau Hospital in good health and could be described as an appearance of a thirty something year old, both medically and physically. Other than the fibroid tumors and anemia, the patient had no other medical conditions. The patient beginning in her twenties practiced good physical exercise and ate a balanced, low fat diet consisting of seafood, fruits,

vegetables and limited red meats and poultry. She had no hypertension, no heart valve problems, no heart murmur, no diabetes, no kidney disease, no pulmonary disease, and no propensity to blood coagulation or other disease. *See Generally, Complaint as amend.* She now has issues with most of the medical conditions listed.

III. INTRODUCTION AND SUMMARY OF ARGUMENT

The medical malpractice area presents an extraordinary legal practice environment. It is governed by high expense and almost always requires medical expert testimony. It is extremely difficult to secure medical experts because the vast majority of medical experts are unwilling to give testimony against another member of the medical community. Therefore, it is extremely difficult to secure legal representation, leading to the non-filing of many legitimate cases of medical malpractice.

In 1999, a National Academy of Sciences' Institute of Medicine study stated that nearly 99,000 Americans die each year as a result of hospital errors. *Learning From Malpractice Claims About Negligent, Adverse Events in the United States*, National Academy of Science, Institute of Medicine, 1999; *see also, Chunliu Zhan, MD and Marlene Miller, "Excess Length of Stay, Charges, and Mortality Attributable to Medical Injuries During Hospitalization*, 290 JAMA, 14, 1868-1874 (October 2003). It noted that the number of deaths surpassed highway deaths, breast cancer deaths or AIDs deaths.

Yet it appears that judges are giving hospitals deference beyond what is fair to all parties involved and beyond what is permitted under Rule 26, Fed. R. Civ. P. regarding the discovery of medical records. Many errors that may occur are routinely recorded in computer systems that are more difficult to conceal if electronic discovery is not permitted, *e.g.*, after surgery, pain medication routinely computer administered, CT scans are computerized but not all images are made available. Access to electronic data in such cases is essential but not permitted in this case. Rule 26 (b) (2), Fed. R. Civ. P. now expressly provides for electronic discovery under the most recent amendments. Prior language in Rule 26 could reasonably be interpreted as inclusive of full and complete electronic discovery. Unfortunately in this case, the petitioner was not permitted to undertake electronic discovery through routine discovery channels, even after demonstrating that the probability of the validity of the hard copy medical records of the plaintiff were not made available to her and could not be considered materially true and correct. Still the district court judge stopped all discovery and requested the plaintiff to provide a certificate of merit based upon an incomplete and inaccurate set of medical records that appears inconsistent with federal and state procedures. Electronic discovery was by far the superior method of discovery available to the petitioner that would either give her access to a complete and accurate record or allow her to obtain corroboration that her medical record had been sabotaged or otherwise, sanitized. How was petitioner expected to provide a certificate of merit based on a false record?

Respondent Hospital could not be prejudiced by any delay since it had custody of the primary evidentiary record that would either confirm its negligence or exonerate it.

There are valid reasons why a litigant would elect to proceed *pro se*. First of all the window of opportunity for filing lawsuits under a theory of negligent medical practice is short, two years in the state of Pennsylvania and many other jurisdictions. Second, the ability of a putative litigant to obtain legal representation is often difficult to secure in time to file the case before the statute of limitation expires. In my case, I suspected that a lawyer sold certain parts of the medical records in my possession to the other side when the same parts of my medical record disappeared from the set he returned to me as time ran out and a similarly abridged set was offered by the Hospital produced at Dr. Lenhardt's deposition. I believe that equal access to discovery is an essential component of federal discovery that should be preserved in this case. The Third Circuit should have required the application of the new provisions for electronic discovery under the Federal Rules for Civil Discovery. Instead, the Third Circuit affirmed the dismissal of the case for failure to prosecute.

A review of the standards applied in failure to prosecute cases by other Circuits shows a degree of disparity that has lead to uneven disposition of cases in the past and would lead to uneven disposition of cases in the future. Our Constitution guarantees all citizens due process of law and equal protection under law. It is certainly important to the judiciary

and in the public interests to apply more uniform principles among the Circuits.

The right to proceed *pro se* is a fundamental right. There should be one set of rules for all *pro se* litigants. I am a member of the legal community. I filed the case, *pro se*, as permitted to all litigants under Section 1654, Title 28, U.S.C. Historically, the right to proceed *pro se* long existed in the common law and was codified in the very first Judiciary Act of 1789 under our Constitution. The rule in federal courts is to treat *pro se* litigants less strict than lawyers in a representative capacity. When the *pro se* litigant is also a lawyer, is it fair to treat the *pro se* litigant as if he or she is a lawyer in a representative capacity substantively while treating he or she as a lay *pro se* litigant for procedural matters, *e.g.*, prohibiting the use of co-counsel during the taking of her deposition? By not docketing the *pro hac vice* appearance of co-counsel, the plaintiff was not permitted to provide her deposition on an equal basis with the other parties to the litigation proceeding with counsel in a representative capacity. Yet the district court and the Third Circuit relied heavily upon my legal status in their assessment of the case and ultimately in their dismissal of the case for failure to prosecute. I believe this presents a significant question for this Court.

Based upon the information presented herein, petitioner urges the Court to grant a *writ of certiorari* to the Third Circuit in this case on all issues presented.

IV. ARGUMENT

Under Rule 10 (a) of the Supreme Court Rules, this Court may grant a *writ of certiorari* when a United States Court of Appeals issues a decision that is in conflict with the decisions in other Circuits. Petitioner asserts that the ruling in this case is inconsistent with decisions in the District of Columbia Circuit, the Second Circuit and the Ninth Circuit. Each Circuit requires notice and notice alone would distinguish their decisions from the decision in this case. The Third Circuit states that notice to the litigant is not a requirement before dismissal of the case. *App.* at 3.

Inherent in all actions of dismissal is both due process of law and equal protection under law, rights guaranteed by the Constitution of the United States of America. *See Fifth, Fourteenth Amendments.* Here, the district court on October 15, 2003, suspended a series of allegations and counter-allegations filed by both sides during the course of discovery. Yet, both the district court and the Third Circuit advocate that it is the petitioner's fault for every thing that happened in the case. *App.* at 2-5, 8-13.[1]

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[1] In a subsequent hearing on November 25, 2003, Judge Surrick undertook to handle the issue of co-counsel even though it was still pending before the Third Circuit. He decided based upon my appearance that there was not anything medically wrong with me so no further discovery should occur until the plaintiff produced a certificate of merit. ***EMPHASIS ADDED.*** Plaintiff told Judge Surrick about the problems with the medical records for her, particularly the records in the possession of the Hospital, citing the record in the deposition of Dr. Lenhardt who confirmed in part what the plaintiff already knew that the records were not a materially true and complete

When the Hospital alters the medical records of Connie Reshard including electronic records, the district court sends the plaintiff to the hospital for an inspection and a production that was to take place by December 9, 2003, **a window of opportunity of 10 calendar days**. Without the computer forensics for electronic documents, this process was certain to fail since Judge Surrick stated that his order in the matter was final and could not be changed, "The above deadlines will not be extended for any reason." *App.* at 21. Plaintiff did not have time to sign contracts with the forensic expert, indemnify their company and spend thousand of dollars when the Hospital had not provided the forensic interrogatories submitted to the Hospital during early 2003 laying the foundation for the computer system framework, servers, location of storage and

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representation of what happened at the Hospital between April 4, 2000 and April 18, 2000. Paul Wright, the Counsel for the Hospital at the Lenhardt deposition stated that the records he produced were the final and complete medical records in issue for Connie Reshard. I cannot be entirely certain everything missing or modified in the record set that the Hospital promoted as the complete set. My first incident of breathing difficulty and chest pain occurred on Wednesday, April 6, 2000. In fact from April 4, 2000 to April 9, 2000, the period prior to finding the pulmonary emboli, my Hospital records on March 20, 2003, contained no nursing notes for that period, missing computerized administration of medicine, no information about being discharged by a resident despite continuance of breathing distress including administration of oxygen on August 9, 2000, test administered, *e.g.* complete computerized images of several CT scans and other information, documented by the Hospital's Dr. Lenhardt. Those records no longer appear in the medical file of Connie Reshard, not even the name of the resident.

backup of files at the Hospital.[2] Even then it would require several visits over several weeks, not one week. How can petitioner be held accountable for failure to prosecute under Rule 41 when any effort she made would have been futile? Judge Surrick's order and the Hospital's actions constructively foreclosed petitioner from taking any action before April 28, 2004 since petitioner's medical records are apparently unreliable.

A. WHETHER RULE 41(b), FED. R. CIV. P. DISMISSAL FOR FAILURE TO PROSECUTE IS REVERSIBLE, IN PART, DUE TO ERRORS *COMMITTED UNDER RULE 26(B)(1) AND (2),* ET SEQ *AND DUE TO INCONSISTENT STANDARDS.*

The district court dismissed the case under Rule 41(b), Fed. R. Civ. P. for failure to prosecute. *See App. at 42.* Rule 41(b) dismissal for failure to prosecute with prejudice is an adjudication on the merits. 41 Wright and Miller, *Federal Practice and Procedure*, Civil 3d § 2370 at 642-43 (2008). Rule 41 is intended to prevent delay and prejudice to the defendant. *Id.* Petitioner case has merit and the Hospital originated the delay issue.

Most Circuits have set forth principles that lead to inconsistent decisions under Rule 41(b) even within the Circuit because some but not all of the standards have to be used or the weight given to a particular standard may vary significantly from Circuit to Circuit and between panels within the

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[2] Petitioner has extensive background in electronic discovery for mergers and acquisitions and for complex litigation.

same Circuit. Most Circuits claim to follow strictly the principles of *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) (held the inherent authority of a court to manage its docket including dismissal where an attorney failed to attend a hearing because of another matter)[3] but a variety of standards have emerge including a merging of the standards set forth under *Chambers v. NASCO*, 501 *U.S.* 32 (1991) (a requiring notice before imposing sanctions under its inherent authority for fraud and frivolous filings under Rule 11, Fed. R. Civ. P., case involving attorney's fees as a sanction).

The guiding principles in the Third Circuit for such cases are the *Poulis* principles[4] that are subject to many different rules some of which may be discarded as long as the lower court mentions that it applied some of the *Poulis* standards. The Third Circuit does not afford notice in its criteria when compared to other Circuits. The balancing of

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[3] This situation is similar to the Hospital's counsel in this case, when it sent a boilerplate Answer to Dr. Kimberly Lenhardt by certified mail and waited more than a month without as much as a telephone call to its own client, petitioner or the filing of a Rule 6(b) motion, despite Rule 12(a)(4)(A) 10-day filing requirement. *App.* at 26-27.

[4] (1) the extent of the party's personal responsibility; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense. *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

alternative sanctions was not considered since it is not necessary according to the Third Circuit.

There is some discourse among some of the circuits regarding the principles used to determine whether a case should be dismissed for failure to prosecute. There is a lot of discretion in different Circuits that leads to disparity among the treatment of litigants depending upon the Circuit. The Ninth Circuit list five criteria[5] in determining these kind of cases and requires that it may affirm if four of the five criteria is met or if three of the five criteria is strongly met in order to dismiss a case under Rule 41, Fed. R. Civ. P. The Second Circuit believes that dismissal is a harsh remedy, only to be used in extremely rare situations not present in our case. The Second Circuit also lists several factors that may or may not be discussed by the district court judge.[6]

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[5] (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage it docket; (3) the risk of prejudice to defendants; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits. *Yourish v California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999); *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994).

[6] (1) whether the problems were with the plaintiff only and the period of duration; (2) the requirement of notice to the plaintiff that dismissal is the consequence; (3) whether there is prejudice to the defendants; (4) the balance between the court's calendar and the opportunity to be heard on the merits; and consideration of lesser sanctions. *See Dodson v. Runyon*, 86 F.3d 37, 39 (2d Cir 1996); *Jackson v. City of New York*, 22 F.3d 71, 75 (2d Cir. 1994) (finding that the duration factor weighed against dismissal where in no instance were the delays caused solely by the plaintiff); *Saylor v. Bastedo*, 623 F.2d 230, 239 (2d Cir. 1980); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 665

When the plaintiff is not the sole alleged perpetrator as is opined here in failure to prosecute cases, dismissal would not be appropriate in the Second Circuit. Note 7, *Jackson v. City of New York,* 22 F.3d 71, 75. ***Emphasis Added.*** *See also, United States ex rel Drake v. Norden Sys.*, 375 F.3d 248, 254 (2d Cir. 2004). (Held that a 17-month delay in filing an amended complaint did not warrant dismissal for failure to prosecute). The District of Columbia Circuit uses three criteria: (1) prejudice to the other party; (2) failure of alternative sanctions to correct the situation; and (3) deterrence of future behavior. *See Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1074 (D.C. Cir. 1986). The District of Columbia Circuit requires notice and the use of alternative sanctions before dismissal. There was no notice in this case contrary to several other circuits including the Second Circuit and the D.C. Circuit. The district court did not consider or first apply alternative and lesser sanctions, if sanctions were required at all. Several of the circuits appear to follow the *Chambers* case. A careful reading of the decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-47, suggests that notice should be provided. In a dissenting opinion for *Chambers*, Justice Kennedy, with whom then-Chief Justice Rehnquist and Justice Souter joined, clearly agreed that *Chambers* modified the ability of a lower court to *sua sponte* dismiss for failure to prosecute without notice to appellant. Justice Kennedy interpreted the majority opinion in *Chambers* as requiring a motion by appellees and the

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(2d Cir. 1980) (noted that dismissal is pungent and rarely used).

requirement of due process notice.[7] Similarly, Justice Douglas, Justice Black and Chief Justice Warren argued that there had been no notice in *Link v. Wabash*. The above analysis supports appellant's contention that dismissal of this case is inconsistent with the more recent *Chambers* ruling and supports the issuance of a *writ of certiorari* in our case.

a) The Defendants Failed To Comply With The Federal Rules Of Civil Procedure.

The Third Circuit failed to consider and apply the provisions of Rule 26 as recently revised regarding electronic discovery. Rule 26(b)(1), Fed. R. Civ. P. requires complete disclosure and Rule 26 (b)(2) specifically limits the conditions for which the district court may limit discovery. *App.* at 39-40. None of the provisions for limitations would have prevented petitioner from securing electronic discovery. Current revisions to Rules 16, 26, *et seq.* specifically provide for electronic discovery. *Id.* Rule 26(b)(2)(B) specifically requires the respondent Hospital or other respondent to show good cause why such electronic discovery should be limited. No such showing by the Hospital was made or considered by the district court or the Third Circuit.

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[7] "The Court also misreads *Link v. Wabash R. Co.*, 370 U.S. 626 (1962). *Link* held that a Federal District Court possessed inherent power to dismiss a case *sua sponte* for failure to prosecute. The majority suggests that this holding contravened a prior version of Fed. Rule Civ. Proc. 41 (b), which the Court today states "appeared to require a motion from a party," *ante*, at 14-15 (emphasis added).

Judge Surrick, by requiring the certificate of merit acted inconsistently with Rule 26 (b)(1) and (2). *Id.* The November 24, 2003 hearing was not the first time petitioner requested preliminary information from the Hospital and other respondents regarding electronic discovery. She did so in her initial series of interrogatories to respondents in January/February 2003. Respondent Hospital in particular avoided cooperation. Subsequent amendments to Rule 26, Fed. R. Civ. P. makes it clear that electronic discovery requires planning and lead-time in order to be successful and ultimately expeditious. In this case only the plaintiff is designated to have committed infractions. *See* Note 1.

The Third Circuit further noted that petitioner's interlocutory appeals were examples of infractions and bad behavior—petitioner sought review of Judge Kelly's failure to allow a *pro se* plaintiff to use co-counsel for her deposition and review of Judge Surrick's infringement on Third Circuit jurisdiction of the co-counsel issue during the pendency of the appeals process that such action by the petitioner does not mitigate the situation.[8] If the interlocutory appeal succeeds, the non-compliance to a district court order is forgiven, but if the interlocutory appeal does not succeed as is the case here, the litigant must be sanctioned. In petitioner's view, dismissal is too harsh. *App.* at 14. Moreover, communication to the district court would have been futile since Judge Surrick said no changes would be

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[8] Third Circuit Case No. 04-1273. *See also*, Opinion, *App.* at 4-6.

made in his order. Communication to the Hospital would have been futile too since their goal was to limit access to all of petitioner's medical records.

b) The District Court Judge's Ruling Based On Prejudice

District Court Judge R. Barclay Surrick showed prejudice against the plaintiff in this case when he stated that the plaintiff looked fine to him, during the November 24, 2003 hearing.[9] Some of my caregivers at the Hospital said I looked fine and should be discharged, all the while I had large blood clots in both lungs. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." ***Emphasis Added***. *Liteky v. U.S.*, 510 U.S. 540, 114 S. Ct. 1147, 1155, 1162 (1994). It is clear that the medical records contain discrepancies that would not be eliminated under the plan Judge Surrick set in motion, a ten-day calendar

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[9] The official transcript omitted the statement by Judge Surrick. It was at this time that the district court judge required a certificate of merit. Senior District Court Judge Robert Kelly discarded the matter regarding a motion to dismiss by respondent Hospital under Rule 12 (b) of the Fed. R. Civ. P. When this lawsuit was filed in 2002, a Pennsylvania procedural rule requiring a certificate of merit had expired. A subsequent rule excluded this lawsuit by excluding all litigation filed before January 27, 2003. *See* 231 Pa. Code Rule 1042.3; 40 Pa. Stat § 1303.512 (2003). Therefore the law of the case essentially excluded the provision from this case. The district court judge's remarks are prejudicial and his actions appear to violate federal law under *Erie v. Tompkins*, 304 U.S. 64 (1938), federal procedural law prevails over state law.

window of opportunity to conduct electronic forensics at the Hospital. *App. at* 20. The outcome is that no true inspection would occur and the Hospital would be free to dictate the course of the case in its favor, leading to a bias against the plaintiff in favor of the defendant Hospital.

The public is at the mercy of this Hospital litigant and in general regarding the custodial control of medical records. Pennsylvania like several other states set forth specific guidelines designed to insure that records are recorded and recorded in the appropriate detail necessary to determine what happened. Indeed Act 13 of the 2002 Pennsylvania Legislative Session, §308, H.B. 1802 states that significant events should be recorded and reported. A serious incident is defined as "An event, occurrence or situation involving the clinical care of a patient in a medical facility that results in death or compromises patient safety and results in unanticipated injury requiring the delivery of additional health care services to the patient." Clearly that is what happened to petitioner.

B. WHETHER THE SAME STANDARDS FOR A LAY PRO SE LITIGANT SHOULD BE APPLIED TO AN ATTORNEY *PRO SE* LITIGANT.

The right to proceed *pro se* was first codified in the Judiciary Act of 1789. 28 *U.S. C. §* 1654 (2000 ed.). Federal courts recognize the right to proceed *pro se* as a fundamental right. *See, Faretta v. California*, 422 U.S. 806 (1975). In the criminal context, proceeding *pro se* maybe subjected to some judicial supervision. *Johnson v. Zerbst*, 304 U.S. 458, 464-

465 (1938). In *Mckaskle v. Wiggins*, 465 U.S. 168, 187 (1984), this Court upheld the use of standby counsel for a *pro se* criminal defendant.

Here petitioner filed this lawsuit *pro se*. Both the district court and the court of appeals applied a lawyer standard to petitioner in dismissing the case under the theory that petitioner should not have the same degree of deference afforded a lay *pro se* litigant. *App.* at *2, 8.* Each time petitioner took actions as a lawyer, she was denied certain privileges because she was proceeding, *pro se*. For example, petitioner sought to bring another counsel in via motion for an appearance *pro hac vice* during her deposition. I was not allowed to do so because I was proceeding *pro se*. I am a member of the Pennsylvania bar and a member of the federal district court bar in Philadelphia where the case is located.

Rule 32(a)(3)(E) Fed. R. Civ. P. suggest that any party may have representation at a deposition.

> "A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition...."

Should an attorney *pro se* litigant have less rights than any other party? That is exactly the outcome in the case for petitioner. This is an important question that should be clarified whether a different set of standards are to be applied to a lay *pro se* litigant as distinguished from an attorney *pro*

se litigant. The environment should be the same for both groups. If a different standard is to be applied to an attorney proceeding *pro se*, then that attorney litigant should not be encumbered by any of the judicial rules applied in the *pro se* context.

C. WHETHER THE COURT ERRED BY DENYING MOTION FOR DEFAULT JUDGMENT AND THE STRIKING OF PLEADINGS.

The Third Circuit failed to reverse the denial of default judgments against each of the respondents. Under Rule 55 (b) each defendant in this case failed without justification to file a timely answer pursuant to Rule 12(a)(1)(A) of the Fed. R. Civ. P. *See Supra* Note 1. Counsel for the Hospital and for Dr. Lenhardt said that they sent several letters to her but she did not respond and they found out that she had moved after the letters were returned. If you have ten days to file an Answer after the district court denies your Rule 12(b), Fed. R. Civ. P. motion, it is not unreasonable to telephone your client who had the same telephone number after she was said to have moved within the same city. Counsel for Dr. Lenhardt did not seek a Rule 6(b) extension of the time, just filed the Answer more than a month later. *App.* at 26-27.

The Third Circuit did not follow its clearly articulated standards, i) whether plaintiff will be prejudiced if default is not granted, ii) whether defendant has a meritorious defense and iii) whether defendant's delay was the result of culpable misconduct. *See Resolution Trust Corp. v. Forest Grove, Inc.*, 33 F.3d 284, 288 (3d Cir. 1994; *Emcasco Ins. Co. v. Sambuch*, 834 F.2d 71, 73 (3d Cir. 1987) Petitioner is the injured party.

When a party fails to timely file a pleading, the Third Circuit clearly states that attorneys must exercise diligence as a means of supporting good cause for a delay or failure to make timely service of process or other legal process. *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 83-84 (3d Cir.), *cert. denied,* 484 U.S. 965, 108 S. Ct. 455 (1987); *Braxton v. United States*, 817 F.2d 238, 242 (3d Cir. 1987).

Similarly, respondent counsel for Dr. Glassner, promptly entered an appearance and immediately initiated discovery without a court order under Rule 26 (d) and (f). Clearly, all of the respondents defaulted or otherwise deliberately failed to comply with the Federal Rules of Civil Procedure. The Hospital immediately filed for a motion for summary judgment close in time to the filing of the late Answer. Under the rules applied to the default judgment in the Third Circuit, petitioner is entitled to judgment against all parties. The standards under the default judgment are similar to the standards applied to failure to prosecute cases and have the same impact on the parties but here the respondents dodged the bullet. The difference between how Rule 55 is administered and how Rule 41 is administered leads to unequal justice under

law. This is clearly an important federal question involving the application of the federal rules.

V. CONCLUSION

Petitioner urges the Court to grant a *writ of certiorari* in this case in order to ensure uniform interpretation of the Federal Rules of Civil Procedure. The case presents several important issues involving differences among the Circuits regarding dismissal for failure to prosecute, the lack of application of electronic discovery to this case and unclear rules for lay *pro se* litigants versus attorney *pro se* litigants. Other issues presented underscore manifest injustice to this petitioner and other litigants.

APPENDIX

Third Circuit Opinion, November 29, 2007

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 06-3170
CONNIE C. RESHARD,
Appellant
v.
THE LANKENAU HOSPITAL, d/b/a, a/k/a MAIN LINE HEALTH;
DR. MICHAEL J. GLASSNER; DR. JOHN SCHILLING; DR. MARK E. SCOTT; DR. KIMBERLY M. LENHARDT; DR. THOMAS J. MEYER;
DR. GEOFFREY P. TREMBLAY; UNKNOWN RESIDENT; MAIN LINE HOSPITAL INCORPORATED, a/k/a The Lankenau Hospital

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-01787)
District Judge: Hon. R. Barclay Surrick

Submitted Under Third Circuit LAR 34.1(a)
November 8, 2007
Before: SCIRICA, *Chief Judge*, AMBRO and JORDAN, *Circuit Judges*.
(Filed: November 29, 2007)

OPINION OF THE COURT

JORDAN, *Circuit Judge.*

In this medical malpractice case, Connie C. Reshard appeals the final judgment of the United States District Court for the Eastern District of Pennsylvania, dismissing her complaint for failure to prosecute. For the reasons stated below, we affirm.

I.

Reshard, a member of the Pennsylvania Bar, brought this medical malpractice suit *pro se* against Lankenau Hospital and six doctors in 2002. Although no significant discovery had taken place, over 140 documents and motions had been filed in the case by the time it was reassigned to the Honorable R. Barclay Surrick from another District Judge. Judge Surrick denied all outstanding motions and ordered the discovery process to be started anew. On November 26, 2003, the District Court ordered Lankenau Hospital to allow Reshard to inspect all of its records pertaining to her treatment and ordered her to produce before February 9, 2003 a statement from a qualified licensed professional indicating that there was a reasonable probability that the defendants' conduct in treating her fell outside acceptable professional standards. December 1, 2003, Reshard filed four new motions, which requested personal information from the District Judge and sought to vacate the Court's previous scheduling and discovery orders. The District Court denied all four motions in an order dated December 31, 2003. In early 2004, Reshard attempted to appeal that order

and certain other orders of the District Court, but this Court dismissed her appeal on November 16, 2004 for lack of jurisdiction.[1] Although Reshard had an appointment to inspect the Lankenau Hospital records, she did not keep that appointment and did not reschedule. Nor did she produce the required statement from a qualified licensed professional. On February 20, 2004, the District Court held a scheduling conference. Reshard did not appear and did not contact the Court to explain her absence. Over two years later, on April 28, 2006, the District Court dismissed the case *sua sponte* for failure to prosecute. At the time the District Court dismissed the case, Reshard had not contacted either the Court or the defendants since the missed February 20, 2004 scheduling conference. The District Court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291.

II.

We review a district court's dismissal for failure to prosecute for abuse of discretion. *Spain v. Gallegos*, 26 F.3d 439, 454 n.17 (3d Cir. 1994). On appeal, Reshard argues that the dismissal was improper for three reasons. First, she argues that the dismissal was improper because the District Court acted *sua sponte* and did not notify her that it planned to dismiss. However, district courts have inherent power to dismiss *sua sponte* for failure to prosecute. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). Moreover, "a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing

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[1] This Court also dismissed on November 16, 2004 an appeal filed by Reshard in March 2003.

an adversary hearing before acting." *Id.* at 633. Next, Reshard argues that the dismissal for failure to prosecute was improper because the District Court misapplied the applicable legal standard. We disagree. When considering whether to dismiss a case for failure to prosecute, courts generally should consider the factors set forth in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984): (1) the extent of the *party's* personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense. In this case, the District Court considered the *Poulis* factors and concluded that all of them, except for the meritoriousness of the claim, favored dismissal. With respect to the meritoriousness of Reshard's claim, the District Court found that Reshard's own conduct in delaying the discovery process made that factor impossible to assess. In light of these findings, and under the circumstances of this case, we cannot say that the District Court abused its discretion in dismissing the case. Because we hold that the District Court's dismissal was proper, we decline to address Reshard's arguments regarding certain allegedly erroneous orders entered by the District Court prior to dismissing the case. Indeed, to the extent that Reshard argues that her actions (or lack thereof) in this case would be excused by an erroneous order, she is incorrect. *See Marshall v.*

Sielaff, 492 F.2d 917, 919 (3d Cir. 1974) ("If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened."); *Spain v. Gallegos*, 26 F.3d 439, 454 (3d Cir. 1994) ("A party disappointed with a court's ruling may not refuse to proceed and then expect to obtain relief on appeal from an order of dismissal or default."). We also reject Reshard's assertion that Judge Surrick appears to be biased against her. The only basis Reshard offers in support of her allegation of bias is Judge Surrick's . Third, and finally, Reshard argues that the District Court was without jurisdiction to enter the order of dismissal (or any other order) because Reshard had appeals pending before this Court. Once again, we disagree. Reshard's appeals were dismissed by this Court for lack of jurisdiction because the orders she was attempting to appeal from were not final within the meaning of 28 U.S.C. § 1291 and were not immediately appealable as collateral orders. As such, they did not deprive the District Court of jurisdiction: [T]he jurisdiction of the lower court to proceed in a cause is not lost by the taking of an appeal from an order or judgment which is not appealable. ... Indeed, a contrary conclusion would enable a litigant temporarily to deprive a district court of jurisdiction at any non-critical or critical juncture including trial itself, thus bringing proceedings in the district court to a standstill while a non-appealable ruling wends its way through the appellate process. *Venen v. Sweet*, 758 F.2d 117, 121 (3d Cir. 1985) (internal quotation

and citation omitted). Accordingly, Reshard's improper appeals did not preclude the District Court from proceeding with this case and, ultimately, dismissing it for failure to prosecute.2 legal rulings, which are insufficient to establish that Judge Surrick was biased. *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

III.

We have considered the remainder of Reshard's arguments and find them unpersuasive. For the foregoing reasons, we affirm the judgment of the District Court.

Rehearing Order, February 13, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 06-3170

CONNIE C. RESHARD,
Appellant
v.
THE LANKENAU HOSPITAL, d/b/a, a/k/a MAIN LINE HEALTH;
DR. MICHAEL J. GLASSNER; DR. JOHN SCHILLING; DR. MARK E. SCOTT; DR. KIMBERLY M. LENHARDT; DR. THOMAS J. MEYER;
DR. GEOFFREY P. TREMBLAY; UNKNOWN RESIDENT; MAIN LINE HOSPITAL INCORPORATED, a/k/a The Lankenau Hospital

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Appeal from the United States District Court

for the Eastern District of Pennsylvania
(D.C. No. 02-cv-01787)
District Judge: Hon. R. Barclay Surrick

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:
/s/ Kent A. Jordan
Circuit Judge
Dated: February 13, 2008

Order And Memorandum of Dismissal For Failure To Prosecute April 28, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CONNIE C. RESHARD ::
CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY :

SURRICK, J. APRIL 28, 2006

MEMORANDUM & ORDER

Plaintiff, Connie C. Reshard, Esquire, a member of the Pennsylvania bar, brought this action pro se against six doctors and Lankenau Hospital, alleging medical malpractice in connection with a procedure that she underwent at Lankenau Hospital on April 4, 2000. For the following reasons, we will dismiss this case with prejudice for failure to prosecute.

I. BACKGROUND

Plaintiff is a practicing attorney and member of the Bar of the Commonwealth of Pennsylvania. Plaintiff's Complaint was filed on April 2, 2002. The case was assigned to the Honorable Robert F. Kelly. After disposing of several preliminary motions, Judge Kelly set discovery deadlines. Those deadlines had to be extended because of discovery disputes. In fact, the discovery process was punctuated by

numerous disputes, several of which went to the Third Circuit. (COA Docket Nos. 03-1623; 03-1899.)

In addition to an unusual number of sanctions requests by all parties, Plaintiff sought recusal of Judge Kelly from the case. Plaintiff asserted that Judge Kelly's bias against her merited disqualification. While Judge Kelly found that the several motions for recusal were insufficient, he voluntarily recused himself, recognizing that "Plaintiff's various motions and issues regarding her disagreement with my decisions has aided in rendering this action over one year old with the filing of over 120 documents and motions." (Doc. No. 128 at 7-8.) The case was reassigned to this Court on April 22, 2003. (Doc. No. 130.) Our first action was to deny all outstanding motions and start the discovery process anew. This decision was made in an attempt to avoid the prior discovery disputes and move the case forward efficiently. At that point, the case was eighteen months old and over 140 documents and motions had been filed, but no significant discovery had been undertaken. On November 26, 2003, we held a Pretrial Conference in open court. Thereafter, as discussed at the conference, an Order was entered directing Defendants to allow Plaintiff to inspect the original Lankenau Hospital records at Lankenau Hospital and to provide Plaintiff with a date stamped copy of the records within two weeks. The Order also required Plaintiff to produce a statement within sixty (60) days from a qualified licensed professional or professionals indicating that the professionals believed that there was a reasonable probability that the care, skill, and knowledge exhibited by each defendant in the treatment of Plaintiff fell outside

acceptable professional standards and that such conduct was a cause in bringing about harm to Plaintiff. (Doc. No. 141.) We advised counsel that after the Court received this statement of merit, the depositions of Plaintiff and Defendants would be immediately scheduled and the case would be moved expeditiously to trial.

On December 1, 2003, Plaintiff filed four additional motions. (Doc. Nos. 142 ,144, 145, 148.) These motions requested nonrelevant information from the Court and sought to vacate the Court's previous orders. The motions again illustrated Plaintiff's intention to further prevent the movement of this case forward. In our Order dated December 31, 2003, we denied each of these motions. (Doc. No. 156.) Plaintiff appealed this Order, as well as our Orders of October 15, and November 26, 2003. (COA Docket No. 04-1273.) This was Plaintiffs third appeal in this case. On November 16, 2004, the Third Circuit dismissed the appeals for lack of jurisdiction. (Doc. No. 160.) Plaintiff still took no action with regard to our discovery Order. Pursuant to the Order of November 26, 2003, Defendant Lankenau Hospital scheduled an appointment with Plaintiff to allow her an opportunity to inspect all of the Hospital's records concerning her medical treatment. Defendant Bates stamped these documents and certified that they were complete. Plaintiff failed to appear to inspect the documents and did not call or e-mail to reschedule the appointment.

On February 20, 2004, we held a conference in court for the purpose of scheduling depositions and setting a trial date. The conference was scheduled to begin at 9:30 a.m. Plaintiff did not appear. At 10:00

a.m., we began the conference despite Plaintiff's absence. Plaintiff did not contact Chambers or Defense counsel to explain her absence or her failure to comply with our Order to produce a certification from a medical professional concerning the merits of her case. At the conclusion of the hearing, Defense counsel made an oral motion for sanctions pursuant to Fed. R. Civ. P. 37(b)(2)(C). Counsel asked that we dismiss the case with prejudice and award appropriate attorney's fees. In the alternative, Counsel asked that we renew Defendants' Motion for Summary Judgment. (Doc. No. 159 at 10.) Since that conference, Plaintiff has not communicated with the Court, has not communicated with Defense counsel, and has done nothing to pursue this case.

II. DISMISSAL FOR FAILURE TO PROSECUTE

A. Legal Standard

Federal courts have an inherent power to dismiss with prejudice a plaintiff's action for lack of prosecution as a necessary sanction to prevent undue delays and to avoid congestion. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-31 (1962). This authority has been expressly recognized by Federal Rule of Civil Procedure 41(b): "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."[1] Fed. R. Civ. P. 41(b). In addition, it is well recognized that

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[1] We note also that Local R. Civ. P. 41.1(a) allows the Court to eliminate abandoned actions from the court's calendar. The rule considers a case abandoned when it has been dormant for more than one year. *Id.*; *see also Young Jewish Leadership v. 939 HKH Corp.*, No. Civ. A. 93-2634, 2005 WL 2050440 (E.D. Pa. Aug. 23. 2005).

"[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31. It is also clear that where a plaintiff fails to take action on a case for an extended period of time, the Court is entitled to dismiss for failure to prosecute. In *Shannon v. General Electric Co.*, 186 F.3d 186 (2d Cir. 1999), the Second Circuit stated: The only action [plaintiff] took during [a] nearly two-year period was to file an untimely notice of appeal of the court's 1996 order, which appeal was subsequently withdrawn for lack of jurisdiction. Those cases in which we have reversed dismissals for failure to prosecute have involved substantially shorter delays than the one at issue here. Where, as here, "inaction and lethargy became the rule," we have not hesitated to affirm a district court's dismissal for failure to prosecute. *Id.* at 194 (internal citations omitted). Similarly, the Third Circuit has made clear that district courts may exercise this power to dismiss and may, in fact, find that it is the only appropriate recourse when "confronted with litigants who flagrantly violate or ignore court orders." *Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992); *see also Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co.*, 843 F.2d 683, 696 (3d Cir. 1988) (affirming dismissal as a Rule 37 sanction for failing to comply with discovery orders over an extended period of time); *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974) (upholding dismissal for failure to prosecute as appropriate under Rule 41(b) and

pursuant to the inherent power of the court). Although "dismissal is a harsh remedy and should be resorted to only in extreme cases," *Mindek*, 964 F.2d at 1373 (quoting *Marshall*, 492 F.2d at 918), "[t]he district courts cannot, and should not, tolerate unjustifiable delays and expenditure of irreplaceable judicial resources caused by litigants, *pro-se* or represented, who will not obey court orders." *Id.* at 1375. The Third Circuit has counseled that when considering whether it is appropriate to dismiss a case, courts should consider the six factors set forth in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984). Those factors are: (1) the extent of the party's personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal . . . and (6) *the meritoriousness* of the claim or defense. *Id.* at 868. "The *Poulis* standard is not a mechanical calculation for deciding whether or not to dismiss a plaintiff's complaint, and not all of the Poulis factors need be satisfied in order to dismiss a complaint. Rather, the decision whether or not to dismiss a claim under *Poulis* is a balancing test, that must be made in the context of the district court's extended contact with the litigant." *Smith ex rel. Ali v. Altegra Credit Co.*, No. 02-CV-8221, 2004 U.S. Dist. LEXIS 21478, at *12 (E.D. Pa., Sept. 22, 2004) (internal citations and quotations omitted). In addition, "when a litigant's conduct makes adjudication of the case impossible, such balancing under *Poulis* is unnecessary." *Sebrell v. Phila. Police*

Dep't, 159 Fed. Appx. 371, 374 (3d Cir. 2005) (citing *Guyer v. Beard*, 907 F.2d 1424, 1429-30 (3d Cir. 1990).

B. Legal Analysis

In the instant case, Plaintiff has not taken any action in this matter in nearly two and a half years. To date, the only action Plaintiff has taken since December 19, 2003 was to file an unsuccessful interlocutory appeal in January 2004 and an unsuccessful appellate petition for rehearing in December 2004.[2] (Doc. No. 157.) Plaintiff has violated discovery orders, failed to appear at scheduled conferences with the Court, and failed to communicate with the Court or opposing counsel.

First, Plaintiff violated our November 26, 2003 discovery Order. In that Order we required Plaintiff to: provide this Court with a written signed statement from an appropriate licensed professional that, after review of the Lankenau Hospital records, the licensed professional believes that there exists a reasonable probability that the care, skill and knowledge exercised or exhibited in the treatment, practice or work that is the subject of the Plaintiff's Complaint fell outside acceptable professional standards and that such conduct was a cause in bringing about harm to Plaintiff. (Doc. No. 141.) With that instruction we warned that failure to comply with this Order would result in "the imposition of severe sanctions." (*Id.*) Plaintiff never produced any documents pertaining to her treatment

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[2] This appeal was dismiss for lack of jurisdiction by the Third Circuit on November 16, 2004. (Doc. No. 160.) The petition for rehearing was denied by the Third Circuit on December 17, 2004. (COA Docket No. 03-1899.)

nor did she provide a legitimate excuse for noncompliance. In addition, Plaintiff failed to appear for an appointment with Defendant to inspect relevant hospital records concerning her treatment and did not call Defense counsel to indicate that she could not make the appointment. (Doc. No. 159 at 3.) Finally, Plaintiff failed to appear at a scheduled hearing on February 20, 2004 and failed to communicate with the Court on that day or in the time since to provide a reason for not appearing. The purpose of that hearing was to schedule depositions in an effort to move the case forward after months of delays in discovery. Plaintiff's failure to appear and to communicate with the Court or Defense counsel has made it impossible to move the case forward. In considering the *Poulis* factors, it is clear that dismissal is the only appropriate action in this matter. Plaintiff's failure to appear, failure to communicate with the Court or Defense counsel, and flagrant failure to comply with Court orders justifies the sanction of dismissal in this case. The docket reveals that Plaintiff has delayed and frivolously contested every step in the pre-trial process. Through the repeated use of frivolous appeals and periods of absolute inaction, this case has been ongoing for four years and only one deposition has been taken. In addition, the nearly two and a half years of total inaction and non-communication by the Plaintiff can no longer be countenanced. Moreover, Defendants have been prejudiced by Plaintiff's delay. Numerous depositions have been rescheduled due to Plaintiff's failure to comply with previous scheduling orders. These tactics have cost Defendants significant resources. Defendants have also been required to

spend money on legal fees combating Plaintiff's motions concerning discovery and sanctions. As a result of the delay, Defendants have not yet even had an opportunity to physically examine Plaintiff and assess the extent of her alleged injuries and her claim as a whole. Furthermore, alternative sanctions would not be feasible or effective in this case. Plaintiff has ignored court orders, failed to appear at depositions and court conferences, and has taken no action at all for almost two and a half years. Clearly, any alternative sanctions would be futile. As a result of Plaintiff's conduct, it is difficult to assess the merits of her claims. However, all of the other *Poulis* factors militate in favor of dismissal in this case. Plaintiff's utter failure to communicate with the Court and to pursue this matter has made adjudication of the case impossible even without consideration of these factors. *See Sebrell*, 159 Fed. Appx. at 374. Accordingly, we are compelled to dismiss this case with prejudice.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CONNIE C. RESHARD ::
CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :

MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY :

ORDER

AND NOW, this 28th day of April, 2006, it is ORDERED that Plaintiff's complaint is DISMISSED with prejudice for failure to prosecute.
IT IS SO ORDERED.

BY THE COURT:
S/ R. Barclay Surrick

U.S. District Judge

District Court Rehearing Denied May 26, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CONNIE C. RESHARD ::
CIVIL ACTION
v. ::
NO. 02-1787
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY :

ORDER

"The purpose of a motion for re 1 consideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Courts

should grant these motions sparingly, reserving them for instances when (1) there has been an intervening change in controlling law, (2) new evidence has become available, or (3) there is a need to correct a clear error of law or fact or to prevent manifest injustice. *Gen. Instrument Corp. of Del. v. Nu-Tek Elecs. & Mfg., Inc.*, 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998). "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." *Corneal v. Jackson Twp.*, 313 F. Supp. 2d 457, 472 (M.D. Pa. 2003) (internal citations omitted). Plaintiff has offered no new evidence, has failed to point to an intervening change in law, and has failed to demonstrate an error of law or fact or a need to prevent manifest injustice.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CONNIE C. RESHARD ::
CIVIL ACTION
v. ::
NO. 02-1787
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY :

ORDER

AND NOW, this 25th day of May, 2006, upon consideration of Plaintiff's Motion To Vacate Order Of Dismissal Or In The Alternative, Motion For Reconsideration (Doc. No. 162) and Defendants' responses thereto (Doc. Nos. 163, 164, 165, 166), it is ORDERED that Plaintiff's Motion is DENIED.1
IT IS SO ORDERED.

BY THE COURT:
/s R. Barclay Surrick

R. Barclay Surrick, Judge

Order, November 26, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CONNIE C. RESHARD, :
Plaintiff : CIVIL ACTION
:
v.
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY, :
Defendants.

ORDER

AND NOW, this 26th day of November, 2003, it is ORDERED as follows: 1. On or before December 9, 2003, Defendant Lankenau Hospital shall permit Plaintiff to view at Lankenau Hospital all original

records regarding the care and treatment of Plaintiff at Lankenau Hospital. 2. On or before December 9, 2003, Lankenau Hospital shall provide Plaintiff with bates stamped copies of all of its original records pertaining to the care and treatment of Plaintiff at Lankenau Hospital. 3. Lankenau Hospital shall also certify to the Court that Plaintiff has received copies of all records pertaining to her care and treatment at Lankenau Hospital. 4. On or before February 9, 2003, Plaintiff shall provide this Court with a written It is not required that the "appropriate licensed professional" who supplies such a statement be the same person who will actually testify at trial. It is required, however, that the "appropriate licensed professional" who supplies such a statement be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony and such qualifications that the trial court would find the licensed professional qualified to testify as an expert at trial. signed statement from an appropriate licensed professional1 that, after review of the Lankenau Hospital records, the licensed professional believes that there exists a reasonable probability that the care, skill and knowledge exercised or exhibited in the treatment, practice or work that is the subject of the Plaintiff's Complaint fell outside acceptable professional standards and that such conduct was a cause in bringing about harm to Plaintiff. The written signed statement shall address each Defendant separately. 5. The above deadlines will not be extended for any reason. 6. Failure to comply with this Order will result in the imposition of severe sanctions. 7. A

scheduling/status conference is scheduled for February 20, 2004 at 9:30 a.m. in Courtroom 8-A.

IT IS SO ORDERED.
BY THE COURT:

_____
R. Barclay Surrick, Judge

Order, September 13, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CONNIE C. RESHARD, :
Plaintiff : CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY, :
Defendants.

ORDER

AND NOW, this 13th day of September, 2002, upon consideration of Plaintiff's Motion for Default Judgment Against Defendants Glassner, Schilling, Scott, Tremblay and Meyer, and the Responses and Replies thereto, it is hereby ORDERED that:

1. the Motion (Dkt. No. 15) is DENIED.

2. Defendants, Dr. John F. Schilling and Mark E. Scott, D.O.'s Cross-Motion to Strike the Complaint or, in the Alternative, to Allow Defendants, Schilling and Scott Additional Time to Answer the Amended Complaint (Dkt. Nos. 0-1 and 0-2) is DENIED in part and GRANTED in pat. Defendants' Motion to Strike the Complaint (0-1) is DENIED. Defendants' Request for Additional Time to Answer the Amended Complaint (0-2) is GRANTED. Defendants Schilling and Scott shall respond to Plaintiff's Amended Complaint within 1wenty (20) days from the date of this Order.

3. Defendant Dr. Geoffrey P. Tremblay's Cross-Motion to Strike the Complaint, or in the Alternative, to Allow Defendant, Dr. Geoffrey P. Tremblay, Additional Time to Answer the Amended Complaint (Dkt. Nos. 0-1 and 0-2) is DENIED IN PART AND granted IN PART. DEFENDANT'S motion to Strike the Complaint (0-1) is DENIED. Defendant's Request for Additonal Time to Answer this Amended Complaint (0-2) is GRANTED.[1] Defendant Tremblay shall respond to Plaintiff's Amended Complaint within twenty (20) days from the date of this Order.

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[1] Defendant Tremblay filed an Answer to Plaintiff's Amended Complaint on August 26, 2002. Although Defendant Tremblay has filed an Answer, the Court will allow him to rile a response to Plaintiff's Amended Complaint. *See Prendergast v. Janecka*, No. 00-3099, 2001 WL 793251, at *1 (E.D. Pa. July 10, 2001); *Trustees of the University of Pennsylvania v. Mayflower Transit, Inc.*, No. 97-1111, 1997 WL 598001, at *1-2 (E.D. Pa. Sept. 16, 1997).

4. Defendant, Thomas J. Meyer's Cross-Motion to Strike the Complaint, or in the Alternative, to Allow Defendant, Thomas J. Meyer, Additional Time to Answer the Amended Complaint (Dkt. Nos. 0-1 and 0-2) is Denied in part and GRANTED in part. Defendant's Motion to Strike the Complaint (0-1) is DENIED. Defendant's Request for Additional Time to Answer the Amended Complaint (0-2) is GRANTED. Defendant Meyer shall respond to Plaintiff's Amended Complaint within twenty (20) days from the date of this Order.

BY THE COURT:

/S/

Robert F. Kelly

Order March 27, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CONNIE C. RESHARD, :
Plaintiff : CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY, :
Defendants.

ORDER

AND NOW, this 27th day of March, 2003, upon consideration of Plaintiff's Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition (Doc. No. 107), it is hereby ORDERED that the Motion is DENIED.

It is further ORDERED that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take part in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action. *See Local R. Civ. P.* 83.5; 83.5.2*; Hearst/ABC-Viacom Entertainment Services v. Goodway marketing, Inc.*, 145 F.R.D. 59, 63-64 (E.D. Pa. 1992).

Order, January 24, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CONNIE C. RESHARD, :
Plaintiff : CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY, :
Defendants.

ORDER

AND NOW, this 24th day of January, 2003, upon consideration of Plaintiff's Motion to Strike Defendants' Main Line Hospitals, Inc. and Dr. Kimberly Lenhardt's Answer and Motion to Compel Discovery and Motion for Summary Judgment for Defendant Lenhardt and Demand for Appropriate Relief (Doc. No. 53), the Reponses and Reply thereto, and in light of the hearing held in this Court on January 24, 2003, it is hereby ORDERED that the Motion is DENIED.

HEARING TRANSCRIPT, EXCERPTS, JANUARY 24, 2003

THE COURT: The reason I wanted this meeting, I didn't think there was any other way to try to straighten this out. We have a number of outstanding motions and we could start just about anywhere. Reshard's motion to strike defendant's, Main Line Hospital's and Dr. Kimberly Lenhardt's answer, Yes?

ATTORNEY FOR LANKENAU AND DR. LENHARDT: That's myself, your Honor. Your Honor, just that we filed our reply motion for that. You know, we were late in filing our answer. However, you know, with the Court's deference, we apologize and ask if we could move forward on the merits. It's been kind of a procedural mess since we got started.

THE COURT: Yes? Do you wish to address that?

MS. RESHARD: Yes, your Honor. There's no procedural mix-up here. The rules are very clear. Ten days after a denial of a Rule 12(b) motion. Plaintiffs were waiting and waiting and we received

no request under Rule 6(b) to this Court for an extension, either before the time expired or after the time expired. Plaintiff expected that the Court was going to have a conference and that there would be a discovery plan submitted by all the parties. You know the fact that –

THE COURT: That doesn't have to do anything with the answer. We're talking about whether or not this answer is going to be allowed.

MS. RESHARD: well, your Honor, the reasons that were given could have been given in a Rule 6(b) motion. There is not excuse. They are licensed attorneys. We are expected to follow the rules. I have been chastised by this Court to follow the rules. It's very clear in every jurisdiction, in every court, if you cannot meet a deadline, for whatever reason, you apply to the Court for permission and the 3rd Circuit, in many cases, I don't have any that I represent at this time, have in the cases on even smaller situations, where a party did not follow the rules and did not have justifiable cause for not doing so. In fact, this particular defendant decided to file it any time that they wanted, which was approximately six weeks from the date of the time.

And the answer filed was basically boilerplate language. Language that could have been filed very, very briefly and shortly after the ten day requirement.

THE COURT: Okay. Can I specifically have your reason for filing the late answer?

ATTORNEY FOR LANKENAU AND DR. LENHARDT: Sure, your Honor. Essentially, that Dr. Lenhardt has moved to Fairfax, Virginia and then when she got to Fairfax, Virginia, she moved

again. We initially mailed her the answer, it came back to us. And then we mailed it again. And then she contacted us, we have a new address. We mailed it again. She reviewed it and then mailed it back to us with her signed verification. That was the only delay in not filing it sooner. You know, I'm not going to get into a finger-pointing match with Ms. Reshard. It's just, you know, she was initially –

Constitution, Federal Rules of Civil Procedure

U.S. CONSTITUTION, FEDERAL STATUTES AND RULES

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL STATUTES, Title 28 (2000 ed.)

Sec. 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Sec. 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States
shall disqualify himself in any proceeding in which his impartiality
might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Sec. 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Sec. 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by

counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

FEDERAL RULES OF CIVIL PROCEDURE (2000 ed.)

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a

specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

[(c) Unaffected by Expiration of Term.] (Rescinded Feb. 28, 1966, eff. July 1, 1966)

(d) For Motions--Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Rule 12. Defenses and Objections—

When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3)(A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an

answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.
(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows:
(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or
(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.
(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in

law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before

interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a

responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) *Initial Disclosures.* Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties

the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) *Limitations.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit,

taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

Rule 26 (b)(2)(B) New Rule

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references

as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

04

(3)

No. 08-73

FILED

AUG 18 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

CONNIE C. RESHARD,

Petitioner,

v.

MAIN LINE HOSPITALS INCORPORATED d.b.a./a.k.a., MAIN LINE HEALTH AND THE LANKENAU HOSPITAL, DR. MICHAEL J. GLASNER, DR. JOHN F. SCHILLING, MARK E. SCOTT, D.O., DR. KIMBERLY M. LENHARDT, DR. THOMAS J. MEYER, PULMONOLOGY ASSOCIATES, INC., AND DR. GEOFFREY P. TREMBLAY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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August 18, 2008

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COUNTER STATEMENT OF QUESTIONS PRESENTED

A. Whether the Court appropriately dismissed the medical malpractice action for failure to prosecute where the plaintiff failed to conduct any meaningful discovery and thereafter failed to communicate with the Court or counsel for a 2 ½ year period?

Suggested Answer: Yes

B. Whether plaintiff, a pro se litigant, who is also an attorney, was granted deference by the Court in the handling of her case?

Suggested Answer: Yes

C. Whether the trial court appropriately applied its discretion in denying plaintiff's motions for default judgment?

Suggested Answer: Yes

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COUNTER STATEMENT OF CASE

A. Facts Regarding Medical Treatment

Connie Reshard, a fifty-two (52) year old female, presented to Lankenau Hospital on April 4, 2000 for vaginal myomectomy procedure due to a diagnosis of prolapsing uterine fibroid. Her past medical history was significant for abdominal myomectomy at age thirty-four (34) for uterine fibroids and she required blood transfusions at that time.

On February 23, 2000 the plaintiff had a biopsy and refused hysterectomy. On April 4, 2000 vaginal myomectomy and uterine packing was performed to remove a prolapsing fibroid. Uterine artery embolization was done April 4, 2000.

The plaintiff did well until April 8, 2000 when she developed difficulty breathing and chest pain. The appellee, Geoffrey Tremblay, M.D., a cardiologist, was consulted on April 9, 2000. He examined the plaintiff and diagnosed probable pulmonary embolism and recommended Heparin therapy, CT scan, chest x-ray, telemetry monitoring and consultation with the pulmonary service. CT scan performed on April 9, 2000 confirmed bilateral pulmonary embolism and a Greenfield catheter was placed. Dr. Tremblay had no further contact with the plaintiff. She responded to treatment and was discharged to home on April 18, 2000.

The defendant has no information regarding plaintiff's previous or follow up medical care because

the plaintiff has objected to production of her prior and subsequent medical records.

B. Counter Statement of Procedural History

Plaintiff filed this medical malpractice action in April 2002. Appendix ("A") at 8. On January 24, 2003, the Court held a hearing and ordered that plaintiff's deposition occur by February 28, 2003. A at 24-25. The deposition was scheduled for February 27, 2003, but canceled by Ms. Reshard on that date due to an alleged illness. On March 6, 2003, the Court ordered plaintiff's deposition to take place by March 31, 2003 and it was scheduled for that date after agreement by all parties. Plaintiff's brief argues she was denied the right to counsel, which is incorrect. The March 27, 2003 Order denied her request to be represented by counsel who was not admitted in the Eastern District of Pennsylvania. A at 23-24. The Court ordered:

> Upon consideration of Plaintiff's Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition (Doc. No. 107), it is hereby **ORDERED** that the Motion is **DENIED**.
>
> It is further **ORDERED** that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take part in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action.

Plaintiff then filed a motion on March 31, 2003, after her deposition was scheduled to begin, requesting that Hughie Hunt, Esquire be admitted *pro hac vice* to represent her at the deposition. The Court did not rule on the motion in time for her deposition because it had not yet been filed. Supplemental Appendix ("SA") at 1.

For whatever reason, plaintiff never chose counsel who was admitted in the jurisdiction where she filed suit to represent her. Further, plaintiff did not even file a motion for representation until March 25, 2003, five (5) days before her rescheduled deposition.

Plaintiff filed two (2) motions and a Writ of Mandamus to have the Honorable Robert Kelly disqualified from the case. A at 9. Judge Kelly denied the first motion. A at 9. The second motion he denied on April 16, 2003, but voluntarily recused himself because he found plaintiff's "fixation on [his] alleged bias, her personal attacks on [his] presence in this action are hindering, rather than facilitating, the conclusion of this case." A at 9.

Plaintiff was treated fairly by the Court throughout the litigation and denial of some motions does not indicate a lack of deference to a pro se plaintiff.

ARGUMENT

INTRODUCTION

The Petition for Writ of Certiorari fails to present any "compelling reasons" or "substantial question" which would warrant review of this matter by the United States Supreme Court. S. Ct. R. 10.

The issues raised by plaintiff amount to a review on the merits involving allegations of erroneous factual findings or misapplicaton of a rule of law by the Court. As such, these issues are important only to the litigants and lack public importance. S. Ct. R. 10. Accordingly, the Petition for Writ of Certiorari should be denied.

A. Dismissal for Lack of Prosecution was the Appropriate Sanction

The plaintiff filed this medical malpractice lawsuit against numerous health care providers by filing a Complaint on April 2, 2002. A at 8. Volumes of discovery motions ensued. A at 9. Plaintiff filed three (3) interlocutory appeals with the Third Circuit, all of which were dismissed for lack of jurisdiction. A at 8, 9, 10. All appeals were terminated by December 17, 2004, when applications for rehearing were denied. A at 14. Plaintiff took no steps whatsoever to advance her claims after that date. Accordingly, on April 28, 2006, her claim was dismissed, sua sponte, for lack of prosecution. A at 8.

A federal trial court may dismiss a plaintiff's action with prejudice for failure to prosecute. Link v. Wabash Railroad Co. 370 U.S. 626 at 629, 82 S. Ct. 1386, 8 L.Ed. 2d 734 (1962). That remedy prevents undue delays in pending litigation and avoids congestion on the court dockets. Id. at 630. Federal Rule of Civil Procedure 41(b) permits the court to dismiss an action for failure of the plaintiff to prosecute the claim. That rule outlines the procedure whereby a defendant can move for dismissal of the claim. However, F.R.C.P. 41(b) does not require that the defendant file a motion

to dismiss. Link, supra, at 630. Rather, the court, can dismiss a lawsuit sua sponte, "acting on its own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief." Id. The courts must have that power to manage their own affairs and to achieve the orderly and expeditious disposition of cases. Id. at 631. See Chambers v. Nasco, Inc., 501 US 32, 111 S. Ct. 2123; 115 L.Ed. 2d 27; 1991 U.S. LEXIS 3318.

To determine whether dismissal is an appropriate sanction for failure to prosecute, the court must usually consider several factors:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 868 (3d. Cir. 1984). Not all of the Poulis factors need to be satisfied to allow for dismissal, but rather a balancing test is used. Smith v. Altegra Credit Co., No. 02-CV-8221, 2004 U.S. Dist. LEXIS 21478, at 12 (E.D. Pa. Sept. 22, 2004). Further, "when a litigant's conduct makes the adjudication of the case impossible, such balancing under Poulis is unnecessary." Scbrell

v. Phila. Police Dept., 159 Fed. Appx. 371, 374 (3d Cir. 2005).

The trial court found that the first five (5) factors were met and that the sixth could not be determined because of the plaintiff's own conduct. A at 16. Plaintiff repeatedly failed to comply with court orders, attend conferences, respond to discovery, or even attend her own court ordered deposition. A at 14-16. She filed multiple, frivolous motions and appeals, whose only purpose could be delaying tactics. A at 14-16. The final interlocutory appeal was dismissed and rehearing was denied on December 17, 2004. A at 14. The silence from plaintiff thereafter was deafening. She did not make any effort whatsoever for the next year and a half, until Judge Surrick finally dismissed her lawsuit for lack of prosecution in April 2006. A at 8. She did not call or write to counsel or the Court at any time after the November 26, 2003 conference. She took no steps to produce a certificate of merit, to conduct discovery or to comply with discovery requests served on her during that time. During the four (4) years that this lawsuit was pending in the trial court, plaintiff failed to supply an expert report to support her claims of medical malpractice. There was no remedy, other than dismissal.

This lawsuit began with plaintiff filing an inordinate number of motions. Ultimately, after about one year of litigation, plaintiff moved for the recusal of the Honorable Robert Kelly due to alleged bias. A at 9. Judge Kelly ultimately denied two (2) motions for his recusal, but then voluntarily withdrew from the case because he could no longer be helpful due to plaintiff's perception of bias. A at 9. Judge Surrick

took over the case on April 22, 2003. Judge Surrick began his tenure by denying all seventeen (17) outstanding motions and scheduling a conference so the case could get a fresh start, away from its stalled beginning. A at 9. On November 26, 2003, Judge Surrick held a pretrial conference with plaintiff and all counsel present. A at 19-21. Judge Surrick issued an order compelling both sides to participate in discovery. A at 19-21. Plaintiff refused to participate in discovery and failed to provide any meaningful rationale for her blatant disregard of the Court's Order.

Plaintiff has argued that she did not have a complete copy of the Lankenau Hospital chart. Judge Surrick ordered on November 26, 2003, that Lankenau make "all of its original records" available for inspection by December 9, 2003. A at 19-21. Plaintiff failed to appear for the inspection, and at the time, failed to advise counsel that she would not appear, or to provide any reason therefor. Plaintiff sets forth a lengthy argument in her brief that she was not permitted to conduct electronic discovery. However, plaintiff never attempted to conduct electronic discovery. She never advised counsel or the Court what steps electronic discovery entailed and she never provided a necessary time frame for electronic discovery. Plaintiff asserts in her brief she has an extensive background in electronic discovery, but provides no evidence in this case of any steps taken to accomplish electronic discovery. This issue appears to be nothing more than a red herring. Rather than trying to comply with Court Orders, plaintiff repeatedly ceased communication with the Court and counsel whenever she disagreed with the Orders.

Plaintiff also failed to participate in her court ordered deposition. She alleges she was hospitalized for complications arising out of the medical malpractice by the appellees, during the first time the deposition was scheduled. However, plaintiff refuses to authorize release of her medical records, so this assertion cannot be confirmed. The deposition was rescheduled for March 31, 2003. All counsel appeared for the deposition. Plaintiff appeared, placed a statement on the record, and then left without giving testimony.

Accordingly, plaintiff stalled the litigation for four (4) years, until the court appropriately determined that dismissal was the appropriate sanction. The Court applied the Poulis, supra, factors and dismissed plaintiff's lawsuit with prejudice.

B. Deference to Pro Se Plaintiff

The plaintiff was accorded deference throughout the litigation, but she was not permitted to violate the rules of the Court. Plaintiff is an attorney, licensed to practice within the Commonwealth of Pennsylvania and the United States District Court for the Eastern District of Pennsylvania, where this case is venued.

Plaintiff raises the issue that she sought to have counsel enter *pro hac vice* to represent her at her deposition and that motion was denied. The denial of that motion had nothing to do with plaintiff being an attorney. First, plaintiff brought suit in April 2002. Her deposition was initially scheduled for February 27, 2003. Plaintiff claims she canceled the deposition on February 26, 2003 due to illness. Plaintiff never

moved prior to February 27, 2003 to have counsel at her deposition. Plaintiff's deposition was next scheduled for March 31, 2003 and plaintiff agreed to the date. Plaintiff first filed a motion to be represented by counsel at her deposition on March 25, 2003, six (6) days before the deposition was scheduled. On March 27, 2003, the Court denied the motion because plaintiff failed to identify a specific attorney in the motion.

The Court ordered:

> Upon consideration of Plaintiff's Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition (Doc. No. 107), it is hereby **ORDERED** that the Motion is **DENIED**.
>
> It is further **ORDERED** that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take part in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action.

A at 23-24.

Plaintiff then filed a motion on March 31, 2003, after her deposition was scheduled to begin, requesting that Hughie Hunt, Esquire be admitted *pro hac vice* to represent her at the deposition. The Court did not rule on the motion in time for her deposition because it had not yet been filed. A at 1.

Plaintiff was treated fairly by the Court throughout the litigation and denial of some motions does not indicate a lack of deference to a pro se plaintiff or any party.

C. The Trial Court Appropriately Denied Plaintiff's Motions for Default Judgment

The plaintiff's Motions for Default Judgment which were filed because of late answers to the Complaint were appropriately denied and the issue is not a compelling issue warranting review by the United States Supreme Court. District Courts have "discretionary authority to determine the appropriate sanction for a particular case and to impose severe sanctions in cases it deems appropriate." Tecmarine Lines, Inc., supra; quoting Coastal Mart Inc. v. Johnson Auto Repair, Inc., 196 F.R.D. 30, 34 (E.D. Pa. 2000) (citing National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 49 L.Ed. 2d 747, 96 S.Ct. 2778 (1976). Three factors apply in determining whether default judgment is appropriate based on the defendant's late answer. Chamberlain v. Giampapa, 210 F.3d 154, 2000 U.S. App. LEXIS 5187 (3d Cir. 2000), citing United States v. $55,518.85 in U.S. Currency, 728 F. 2d 192, 195 (3d Cir. 1984). Those three factors include "(1) prejudice to the plaintiff if default is denied, (2) whether the defendant appears to have a litigable defense, and (3) whether defendant's delay is due to culpable conduct." Id.

The Chamberlain case involved a medical malpractice claim and the Court found the plaintiff was not prejudiced by the denial of default judgment. Id. The Third Circuit has held that prejudice to the

plaintiff does not occur simply because the plaintiff must litigate the merits of the claim. Tecmarine Lines, Inc., supra; citing Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 656-657 (3d Cir. 1982). Rather, prejudice occurs when the plaintiff's ability to pursue the claim is hampered through loss of evidence or increased fraud potential. Id. Also, the defendant's Answer in Chamberlain, supra, did allege a complete defense to the allegations in the Complaint. Id. The defendant does not need to prove the merit of the defense, but rather, need only offer a defense, which, if successful at trial, would completely bar the action. Tecmarine Lines, Inc. v. CSX Intermodal, Inc., 2001 U.S. Dist. LEXIS 12398 (U.S.D.C. E.D. Pa. 2001); citing International Brotherhood of Electrical Workers, Local Union 313 v. Skaggs, 130 F.R.D. 526, 529 (D. Del. 1990). Finally, the Court noted there was no evidence to suggest "that the defendant's delay in filing an answer was due to culpable conduct, which in the Third Circuit is conduct that is 'taken willfully or in bad faith.'" Chamberlain, supra; quoting Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 124 (3d Cir. 1991).

In the instant case, the default judgment was appropriately denied. The plaintiff was not prejudiced in any way by the denial of the default judgment. She has been forced to litigate her medical malpractice claim on the merits. Through no fault of the defendants, she has been unable to make out a prima facie case of negligence. The defendants have all asserted complete defenses to the lawsuit. Finally, there is no evidence that the defendants acted with culpable conduct, i.e., the conduct was not willful or in bad faith.

D. Conclusion

Ms. Reshard has not cited any "compelling reasons" or "substantial question" for granting a Writ of Certiorari. Sup. Ct. R. 10. She has raised issues which are of importance only to the litigants themselves. Further, the trial court appropriately dismissed the action for lack of prosecution and the Third Circuit agreed. For all the foregoing reasons, Geoffrey Tremblay, M.D. respectfully requests this Honorable Court deny plaintiff's Petition for Writ of Certiorari.

Respectfully submitted,

YOUNG & McGILVERY, P.C.

BY:

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Dated: August 18, 2008

APPENDIX

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 02-1787

[Filed April 16, 2003]

CONNIE C. RESHARD, Plaintiff,	)
v.	)
MAIN LINE HOSPITAL, INC. d/b/a THE LANKENAU HOSPITAL a.k.a MAIN LINE HEALTH, et al., Defendants.	)

ORDER

AND NOW, this 16th day of April, 2003, upon consideration of Plaintiff's Motion for Reconsideration of the Motion to Disqualify Senior Judge Robert F. Kelly, it is hereby ORDERED that:

1. The Motion (Doc. No. 119) is DENIED and

2. Plaintiff's Motion to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455 (Doc. No. 122) is DENIED as moot.

IT IS FURTHER ORDERED that, based upon the reasons set forth in the Memorandum Opinion, I voluntarily RECUSE myself from this action.

BY THE COURT:

/s/
Robert F. Kelly, Sr. J.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 02-1787

[Filed April 16, 2003]

CONNIE C. RESHARD, Plaintiff,	)
v.	)
MAIN LINE HOSPITAL, INC. d/b/a THE LANKENAU HOSPITAL a.k.a MAIN LINE HEALTH, et al., Defendants.	)

MEMORANDUM

ROBERT F. KELLY, Sr. J.

Presently before this Court is the Motion for Reconsideration to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455 and Points and Authorities. (Doc. No. 119). This *pro se* personal injury action is based upon alleged medical malpractice by the following Defendants: Main Line Hospitals, Inc., d/b/a and a/k/a Main Line Health and

The Lankenau Hospital and its employees, Dr. Kimberly Lenhardt; Dr. Michael Glassner; Dr. Thomas Meyer; Dr. Mark Scott; Dr. John Schilling and Dr. Geoffrey Tremblay.[1] The instant action was filed on April 2, 2002. For the past year, the Court has attempted to conduct this action as efficiently as possible. The Court's efforts have resulted in numerous hearings, telephone conferences, motions and orders, requiring the Court's attention on a daily basis. The culmination of the Court's substantial efforts has resulted in, among other things, the filing of three motions by Plaintiff seeking my disqualification from the action, a Writ of Mandamus and an appeal.[2] For the reasons that follow, the Motion will be denied.[3]

---

[1] The Court has jurisdiction over this action based upon diversity. See 28 U.S.C.A. § 1322.

[2] Plaintiff's first Motion to Disqualify Senior Judge Robert F. Kelly was denied by an Order dated March 28, 2003. (Doc. No. 116). Plaintiff filed her Motion for Reconsideration of my denial of her Motion for Disqualification on March 31, 2003. (Doc. No. 119). Also, on March 31, 2003, Plaintiff filed an identical Motion to Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455. (Doc. No. 122). All three motions are materially identical to one another.

[3] As an initial matter, the issue of jurisdiction must be addressed. Review of the Docket in this matter shows that Plaintiff filed the instant Motion for Reconsideration to Disqualify Senior Judge Robert F. Kelly on March 31, 2003. (Doc. No. 119). Additionally, on March 31, 2003, Plaintiff filed a Notice of Appeal. (Doc. No. 120). Thus, Plaintiff filed her Motion for Reconsideration and Notice of Appeal on the same day. "It is well established that '[t]he filing of a notice of appeal . . . confers jurisdiction on the

I. STANDARD

A motion for reconsideration is appropriate only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is need to correct a clear error of law or prevent

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court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" Sheet Metal Workers' Intern. Ass'n Local 19 v. Herre Bros., Inc., 198 F.3d 391, 394 (3d Cir. 1999)(citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982))(footnote omitted). Plaintiff's Notice of Appeal states that she is appealing "the Order entered in this action on the 27th day of March 2003, and certain other collateral orders on the 27th and 28th days of March 2003." (Doc. No. 120). Plaintiff's Notice of Appeal is unclear about whether she is appealing the Court's March 28, 2003 Order denying her Motion for Disqualification. However, the Court retains jurisdiction whether or not Plaintiff has appealed the Court's March 28, 2003 Order. In the case where Plaintiff's appeal includes the Court's Order regarding disqualification, Plaintiff's Motion for Reconsideration allows for this Court to retain jurisdiction. Where any motion for reconsideration is filed prior to the filing of a notice of appeal, "jurisdiction remains in this Court until all Motions for Reconsideration are decided." Greene v. London Harness & Cable, No. 99-3807, 2001 WL 359838, at *1 (E.D. Pa. Apr. 3, 2001); see also Vaidya v. Xerox Corp., No. 97-547, 1997 WL 732464, at *2 (E.D. Pa. Nov. 25, 1997); Fed. R. App. P. 4(a)("A notice of appeal filed . . . before deposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal until the entry of the order disposing of the last such motion outstanding.). In the case where Plaintiff's appeal does not include the Court's March 28, 2003 Order denying Plaintiff's Motion for Disqualification, the Court has jurisdiction over the instant motion because the motion involves aspects of the case that are not involved in the appeal.

manifest injustice. N. River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995). However, such motions should only be granted sparingly. Armstrong v. Reisman, No. 99-4188, 2000 WL 288243, at *2 (E.D. Pa. Mar. 7, 2000).

II. DISCUSSION

a. Recusal Under 28 U.S.C. §§ 144 and 455

Plaintiff requests my disqualification pursuant to sections 144 and 455 of Title 28 of the United States Code. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144. As a initial matter, "[a] judge is not automatically required to recuse himself or herself upon the filing of a motion under [Section] 144." Schreiber v. Kellogg, 838 F. Supp. 998, 1003 (E.D. Pa. 1993). "He or she must first pass on the legal and factual sufficiency of the motion and ascertain whether the facts alleged fairly support a charge of bias." Id. (citing Mims v. Shapp, 541 F.2d 415 (3d Cir. 1976)). Thus, [i]t is the duty of a judge against whom a [S]ection 144 affidavit is filed to pass upon the legal sufficiency of the facts alleged." United States v. Enigwe, 155 F. Supp.2d 365, 369 (E.D. Pa. 2001)(quoting United States v. Townsend, 478 F.2d 1072, (3d Cir. 1973))(quotation marks and citation omitted). "The mere filing of an affidavit, however, does not automatically disqualify a judge." Id. (citing Townsend, 478 F.2d at 1073). "Disqualification results only from the filing of a timely and sufficient affidavit." Id. (quoting Townsend, 478 F.2d at 1073)(quotation marks omitted).

"In evaluating a motion brought under [Section] 144, the 'test is whether, assuming the truth of the facts alleged, a reasonable person would conclude that a personal as distinguished from a judicial bias exists.'", Id. (quoting Mims, 541 F.2d at 417). "As a rule, only allegations of personal bias and prejudice will suffice and the bias or prejudice must stem from an extrajudicial source."[4] Id. (citations omitted).

---

[4] A "rarely invoked" exception to the requirement that bias must stem from an extrajudicial source "requires disqualification when a judge displays 'pervasive bias' towards [the party seeking recusal] regardless of the source of the bias." United States v

"Extrajudicial bias is 'bias not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings.'" Schreiber, 838 F. Supp. At 1003 (quoting Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981))(citations omitted). When examining the allegations, "[n]either the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the judge's personal knowledge to the contrary." Enigwe, 155 F. Supp.2d at 370 (quoting Mins, 541 F.2d at 417)(quotations marks and citation omitted).

Section 455, provides, in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Rosenberg, 806 F.2d 1169, 1174 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987). Upon examination of Plaintiff's allegations, the Court does not believe the allegations prove any bias against Plaintiff, much less the pervasive bias necessary to invoke the pervasive bias exception. Thus, the Court's actions do not provide a basis for the operation of the pervasive bias exception.

28 U.S.C. § 455. Under Section 455, "[t]he applicable inquiry is whether a reasonable [person] knowing all the circumstances would harbor doubts concerning the judge's impartiality." United Staes v. Vespe, 868 F.2d 1328, 1341 (3d Cir. 1989)(citations omitted); see also United States v. Dalfonso, 707 F.2d 757, 760 (3d Cir. 1983). "This rule is limited by the 'extrajudicial source' doctrine, which warrants a judge's disqualification where the source of the partiality lies in knowledge gained outside the course of judicial proceedings. Viola v. United States, No. 99-586, 2003 WL 147779, at *1 (E.D. Pa. Jan. 21, 2003)(citing Liteky v. United States, 510 U.S. 540, 554-56 (1994)).

b. Plaintiff's Motion[5]

In her motion for disqualification, Plaintiff alleges that the record displays a pattern of partiality against her and in favor of Defendants. In support of Plaintiff's claims, she asserts various instances which

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[5] Both Plaintiff's Motion for Reconsideration and her original Motion to Disqualify do not contain an affidavit, but include a "Verification in Lieu of an Affidavit." (See Doc. Nos. 109 and 119). Plaintiff's "Verification" does not appear to be either witnessed or notarized. (Id.). In both motions, Plaintiff's verification states that her attached motion is asserted in good faith and contains information which demonstrates Judge Kelly's bias in favor of Defendants (Id.). Therefore, instead of a separate affidavit, Plaintiff relies upon the allegations and conclusions contained within her motions to support her argument. (Id.). As a result of Plaintiff's election not to attach a separate affidavit, the Court considers the allegations asserted in Plaintiff's motions to support her claims of bias as if they have been alleged within a separate affidavit.

allegedly show partiality. The instances upon which Plaintiff relies are the following allegedly biased rulings made by the Court pertaining to numerous discovery issues; a March 6, 2003 telephone conference, where Judge Kelly allegedly advised Defendant Michael Glassner to file a Motion for Sanctions regarding the Plaintiff's deposition scheduled for February 27, 2003; an allegation that Judge Kelly scheduled a telephone conference in this case on February 26, 2003 at 4:30 p.m., after Plaintiff had called the Judge's chambers that morning and left a voice message that she was having a medical emergency; and an allegation that Judge Kelly's prior rulings regarding Plaintiff's use of counsel has improperly denied assistance of counsel to Plaintiff. (See Pl.'s Mot. To Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455; Pl.'s Mot. For Reconsideration; Pl.'s Mot. To Disqualify Senior Judge Robert F. Kelly Under 28 USC § 144 and 28 USC § 455).

The Court finds that the allegations in support of Plaintiff's motion calling for my disqualification are insufficient to support her claims of bias. Mindful of the rule that the allegations contained in Plaintiff's motion must be accepted as true, the Court finds that Plaintiff's allegations are insufficient as a matter of law. Assuming Plaintiff's allegations are true, there are no statements or allegations based upon personal, or extrajudicial bias. Thus, Plaintiff fails to offer any facts or allegations that the Court harbors personal or extrajudicial bias against her. Plaintiff's allegations relate to prior rulings and actions taken by the Court in the course of its participation in this case. In addition, Plaintiff's motion contains conclusory

allegations and opinions which need not be accepted as true. Consequently, the Court finds that no reasonable person, knowing all the circumstances, would harbor doubts concerning the Court's impartiality. As a result of Plaintiff's failure to allege sufficient facts to prove that the Court has a personal bias or prejudice against her, I properly denied Plaintiff's original motion seeking my disqualification on March 28, 2003. Plaintiff's instant Motion for Reconsideration is based upon the ground that my denial was improper. Since I properly denied Plaintiff's motion based upon the legal insufficiency of her allegations, Plaintiff's Motion for Reconsideration is denied.

c. Voluntary Recusal

Although I stand behind my denial of Plaintiff's motion for my disqualification, and vehemently oppose any allegations of prejudice or bias, I conclude that recusal of myself from this action is necessary. In view of Plaintiff's irrational fixation on my alleged bias, her personal attacks on my presence in this action are hindering, rather than facilitating, the conclusion of this case. As an illustration of the aforementioned, Plaintiff has filed three motions seeking my disqualification from the action. (See Doc. Nos. 109, 119 and 122). The motions include allegations against me from the beginning stages of the case until the present time. In support of her argument seeking my disqualification, Plaintiff focuses upon virtually all my actions and decisions, especially my decisions pertaining to discovery. Plaintiff's various motions and issues regarding her disagreement with my decisions has aided in rendering this action over one

year old with the filing of over 120 documents and motions. Additionally Plaintiff has filed a Writ of Mandamus and a separate appeal concerning decisions that I made regarding discovery and the assistance of counsel. As a result, Plaintiff's numerous issues with my decisions not only involves this Court, but has expanded to include the involvement of the Court of Appeals for the Third Circuit.

In this action, I have tried my best to move the case along as efficiently and expeditiously as possible. Even with my best efforts, Plaintiff has not engaged in any meaningful discovery despite the fact that discovery is scheduled to conclude on April 30, 2003. It appears that Plaintiff has mistakenly interpreted my efforts to efficiently advance this litigation as some sort of prejudice or bias against her. My efforts in advancing this action are not based upon prejudice or bias, but are premised upon judicial economy, saving the parties valuable time and expense, and in the interest of allowing this action to come to a just conclusion. At this stage of the case, in light of Plaintiff's recent filings, it appears that Plaintiff is now shifting her litigation and disdain towards the Court. An example of this shifting of priorities can be found in many recent filings by Plaintiff which include personal allegations against me and my management of the case.

As a result of the aforementioned, it is clear to me that my involvement in this action has turned into an impediment. Currently, the case is at a virtual standstill due to the present motions for my disqualification, the two existing appellate motions and Plaintiff's Emergency Motion for Stay Pending

Appeal and Writ of Mandamus. Thus, in an attempt to move this action forward, I conclude that my voluntary removal is necessary. As a result, in the interest of judicial economy, I hereby voluntarily recuse myself from this action.

III. CONCLUSION

For all the foregoing reasons, Plaintiff's Motion for Reconsideration is denied. The Court's March 28, 2003 denial of Plaintiff's Motion to Disqualify Senior Judge Robert F. Kelly is appropriate because Plaintiff's Motion is legally insufficient. Since Plaintiff has not presented an intervening change in controlling law or newly available evidence, and in the absence of a need to correct a clear error or prevent manifest injustice, the Court denies Plaintiff's Motion for Reconsideration. Although Plaintiff's Motion for Reconsideration is denied, I voluntarily recuse myself from the action. I deny any claims of prejudice or bias, however, I find that my recusal is necessary for the reasons enumerated above.

ADDENDUM[6]

The Court recognizes that it is unnecessary to explain any of the allegations made by Plaintiff in her motion. However, in an attempt to set the record straight and make this opinion complete, the Court will attempt to clarify some of the allegations made by Plaintiff. By clarifying some of Plaintiff's allegations, the Court is able to show that there has not been any bias or prejudice against Plaintiff in favor of Defendants.

Plaintiff's declaration that I advised Defendant Michael Glassner to file a motion for sanctions during a March 6, 2003 telephone conference is inaccurate. On March 6, 2003, the Court held a telephone conference regarding discovery and the scheduling of depositions. Towards the conclusion of the telephone conference, counsel for Defendant Dr. Michael Glassner stated that he was considering filing a motion for sanctions against Plaintiff for her failure to appear at her deposition. Counsel asked me if I would like to address the issue during the telephone conference or if I would prefer to address the issue in a motion. I stated that if counsel was planning on

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[6] In various motions throughout this case, Plaintiff has included her version of events pertaining to the Court's actions. As a result, Plaintiff's version of events regarding the Court's actions has been repeatedly asserted and maintained without correction. The Court uses this Addendum as a means of clarifying and setting the record straight regarding what actually occurred. The Court, however, notes that its decision denying Plaintiff's Motions for Disqualification and Reconsideration are not based upon what is set forth in the Addendum.

filing a motion then it would be better to file a motion rather than raise the issue over the phone.

By offering an accurate account of events and, more importantly, placing them properly within context, it is evident that Plaintiff has proffered a distorted rendition of what really occurred. By presenting what was said out of context, Plaintiff has made an innocent and impartial exchange between myself and Dr. Glassner's counsel out to be an improper and prejudicial instruction to counsel to file a motion for sanctions against Plaintiff. The true and accurate account of what occurred shows that Plaintiff's use of this instance as an example of impartiality is without merit.

As for Plaintiff's allegation that I scheduled a telephone conference in this case on February 26, 2003 at 4:30 p.m. after she left a voice message in the morning stating that she was having a medical emergency, it is false. Prior to February 26, 2003, upon a request by defense counsel, the Court scheduled a 4:30 p.m. telephone conference for Wednesday, February 26, 2003. Before scheduling the telephone conference, the Court inquired of the availability of all counsel, including Plaintiff. Upon receiving a convenient date for all involved, the Court scheduled the conference call for 4:30 p.m. on February 26, 2003. Before business hours on February 26, 2003, at approximately 8:30 a.m., Plaintiff left a voice message with my chambers stating that she was having a medical emergency and to give her a call back. The Court notes that Plaintiff's message stated only that she was having a medical emergency and to call her back and did not state anything else. At

approximately 8:45 a.m., my law clerk attempted to contact Plaintiff. Unable to personally speak with Plaintiff, my law clerk left a message on Plaintiff's voice mail instructing Plaintiff to get in touch with chambers. Throughout the day, mindful of the 4:30 p.m. telephone conference, my law clerk left several messages on Plaintiff's voice mail. At approximately 4:30 p.m.,. in a last attempt to salvage the telephone conference, my law clerk called Plaintiff and left a final message on Plaintiff's voice mail stating that the 4:30 p.m. telephone conference had been canceled due to Plaintiff's absence. The voice mail message also instructed Plaintiff to contact chambers in order to re-schedule the conference. Unable to reach Plaintiff, my law clerk then immediately called all relevant defense counsel and informed them that the telephone conference was canceled due to Plaintiff's medical emergency. My law clerk also instructed defense counsel that the telephone conference would be re-scheduled.

On Thursday, February 27, 2003, Plaintiff called chambers in the afternoon and spoke with my law clerk. Plaintiff explained to my clerk that she had been in the emergency room and was unable to telephone the Court. My law clerk told Plaintiff that the telephone conference would be re-scheduled upon the availability of Plaintiff and defense counsel. My law clerk learned of the availability of all involved, including Plaintiff, and re-scheduled the February 26, 2003 telephone conference for March 6, 2003 at 8:45 a.m. The re-scheduled telephone conference occurred on March 6, 2003 and included Plaintiff.

As evidenced by the true and accurate account of what occurred in relation to the February 26, 2003 telephone conference, Plaintiff's account of events is incomplete and patently untrue. The Court accommodated Plaintiff, without issue, by canceling the original telephone conference and re-scheduling it. At no time did the Court ever have a telephone conference regarding this action without the inclusion of Plaintiff. Plaintiff's contention otherwise is not a distortion of the facts, but is completely false.

Lastly, Plaintiff mistakenly alleges that I have improperly denied her the assistance of counsel. I have not improperly denied Plaintiff the assistance of counsel. Plaintiff, who is a licensed attorney in the Commonwealth of Pennsylvania, has represented herself since the inception of this action. Almost one year into the action, at the March 20, 2003 deposition of Dr. Lenhardt, Plaintiff attended the deposition with a man named Bashiru Jimod. Mr. Jimod, who apparently is an attorney, has never entered his appearance on behalf of Plaintiff as counsel of record. In addition, there has never been any motion for *pro hac vice* admission regarding Mr. Jimod. In fact, it was at Dr. Lenhardt's deposition where the Court and defense counsel first learned of Mr. Jimod's existence. At the deposition, defense counsel objected to Mr. Jimod's presence and, by telephone, I permitted Mr. Jimod to be present for the sole purpose of conferring with Plaintiff regarding the questions.

On March 25, 2003, six days before Plaintiff's scheduled deposition, Plaintiff filed an Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition. (Doc. No.

107). This motion, as its name implies, was a motion requesting clarification and authorization by the Court for Plaintiff's use of counsel at her own deposition. The motion was neither an entry of appearance nor a *pro hac vice* motion. The motion was deficient in that it failed, among other things, to identify the attorney Plaintiff wished to have assist her and did not provide any information whatsoever about the undetermined attorney. On March 27, 2003, after considering Plaintiff's motion, I issued an order denying the motion. (Doc. No. 111). In an attempt to offer Plaintiff some guidance, and to help ensure the taking of Plaintiff's deposition on March 31, 2003, the Court's March 27, 2003 Order included the following language:

> It is further ORDERED that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take art in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action. See Local R. Civ. P. 83.5; 83.5.2; Hearst/ABC-Viacome Entertainment Services v. Goodway Marketing, Inc., 145 F.R.D. 59, 63-64 (E.D. Pa. 1992).

(Doc. No. 111 (Court's March 27, 2003 Order)).

Thus, through this Order, I attempted to assist Plaintiff by providing the appropriate rules and relevant precedent regarding *pro hac vice* admission.

Apparently, on March 31, 2003, Plaintiff attended her deposition by herself. Plaintiff put a statement on

the record that she had filed a notice of appeal appealing my March 27, 2003 Order pertaining to Plaintiff's request for authorization to secure the assistance of associate counsel at her deposition. Plaintiff refused to continue her deposition fearful that she may suffer prejudice if she was made to continue with the deposition without the assistance of counsel. Also, on March 31, 2003, Plaintiff filed an application for Hughie Hunt, Esq. to appear *pro hac vice* pursuant to Rule 83.5.2(b) of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania. (Doc. No. 123). Prior to March 31, 2003, on Friday, March 28, 2003, at approximately 4:55 p.m., Plaintiff called my chambers and asked my law clerk if she had received Plaintiff's expedited *pro hac vice* motion which was filed that afternoon. My clerk informed Ms. Reshard that she had not seen the motion. The Court tried in vain to locate Plaintiff's *pro hac vice* motion prior to the commencement of her deposition at 10:00 a.m. on Monday, March 31, 2003 in order to ensure that nothing would delay the taking of Plaintiff's deposition. However, after viewing the application and the attached cashier's receipt, it appears that the Court was unable to locate Plaintiff's motion because it had not been filed until the afternoon of March 31, 2003.

As a result of the aforementioned, I did not, and never intended, to prevent Plaintiff from having the assistance of counsel. However, as an officer of the Court, I have required that Plaintiff appropriately comply with applicable rules of civil procedure, federal and local, pertaining to the assistance of outside counsel. Upon viewing an accurate account of what

happened in regard to Plaintiff's assistance of counsel claims, there is absolutely no bias or partiality to be found.

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No. 08-73

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AUG 18 2008
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CONNIE C. RESHARD,

Petitioner,

v.

LANKENAU HOSPITAL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MICHAEL J. GLASSNER, M.D.

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REASONS FOR DENYING THE PETITION

This Court should deny plaintiff's petition because plaintiff has clearly failed to demonstrate that the decisions of the courts below conflict with any decision of this Court or another Court of Appeals, that the Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of proceedings that this Court should exercise its supervisory power, or that the decisions of the courts below involve a federal question that has not been decided by this Court. In fact, as will be shown below, plaintiff's first question presented was squarely addressed by this Court in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S. Ct. 1386 (1962), and that holding was properly applied to the instant matter by the lower courts. Moreover, plaintiff's remaining questions presented clearly fail to raise important issues that justify the exercise of this Court's supervisory power. Therefore, as plaintiff clearly has failed to meet her burden of establishing that compelling reasons exist for why her petition should be granted, this Court should deny plaintiff's Petition for a Writ of Certiorari.

A. The District Court Did Not Violate Plaintiff's Due Process Rights, the Rules of Civil Procedure, or Any Decision of This Court by Dismissing Plaintiff's Case *Sua Sponte*.

Plaintiff's first argument in support of her petition is difficult to follow as it contains multiple allegations of error that are seemingly unrelated. However, it appears that plaintiff's primary argument is that the district court's *sua sponte* dismissal of her case deprived her of

due process and equal protection under the law. Plaintiff contends that the standards applied by the district courts in the Third Circuit for determining when dismissal for failure to prosecute a case is appropriate vary significantly from the standards applied by district courts in other circuits. Plaintiff seems to suggest that the test applied by the Third Circuit is much more stringent than the test applied by other circuits, particularly since the Third Circuit allows district courts to dismiss a plaintiff's case *sua sponte* and without notice. Plaintiff also maintains that the *sua sponte* dismissal of her case without notice violates this Court's holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991). Plaintiff asserts that these alleged errors are so compelling that this Court should exercise its prerogative of granting further appellate review. However, plaintiff's argument is clearly without merit.

1. **This Court has unequivocally held that district courts possess the power to dismiss a cause of action with prejudice *sua sponte* for a plaintiff's failure to diligently prosecute his claims.**

It is well-settled that federal trial courts possess the authority to dismiss a cause of action with prejudice *sua sponte* if a plaintiff fails to timely prosecute his claims. *Link v. Wabash R.R.*, 370 U.S. 626, 82 S. Ct. 1386, 1388 (1962). "The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Id.* "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by

rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 1389. *Accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 2132 (1991).

Moreover, this Court has explicitly held that that the failure of district courts to give notice of the possibility of dismissal or the failure to hold an adversarial hearing does not necessarily violate a litigant's constitutional right to due process. *Link*, 82 S. Ct. at 1389-90. In *Link*, this Court acknowledged that the fundamental requirement of due process is that litigants be granted an opportunity to be heard upon such notice and proceedings as are sufficient to ensure the right for which the constitutional protection is invoked. *Id.* at 1389 (*citing Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S. Ct. 599, 606 (1944)). However, this Court then observed that "this does not mean that every order entered without notice and a preliminary adversary hearing offends due process." *Link*, 82 S. Ct. at 1389. This Court then explained that "[t]he adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Id.* at 1389-90. Moreover, this Court noted that the availability of a corrective remedy, such as the remedy provided by Federal Rule of Civil Procedure 60(b), renders the lack of prior notice of less consequ nce. *Id.* at 1390. Accordingly, this Court expressly held that "when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute

even without affording notice of its intention to do so or providing an adversary hearing before acting." *Id.*

In the instant matter, plaintiff contends that the test applied by the Court of Appeals for the Third Circuit for determining when dismissal for failure to prosecute a case is appropriate varies significantly from the tests applied in other circuits. Plaintiff argues that other courts of appeals require district courts to give advance notice before dismissing a case for failure to prosecute. Plaintiff then asserts that the Third Circuit does not require prior notice in such cases and that the disparate treatment of plaintiffs among the circuits constitutes unequal treatment under the law. Plaintiff argues that this unequal treatment is unconstitutional.

However, even assuming, *arguendo*, that other circuits require district courts to give prior notice to litigants before dismissing a case for failure to prosecute, this does not render the test applied in the Third Circuit unconstitutional. Indeed, all that our Constitution guarantees is that litigants receive the minimum requirements of due process. The fact that some circuits may provide litigants with additional protections does not mean that the Third Circuit's failure to provide those same protections is unconstitutional. Rather, pursuant to this Court's holding in *Link*, it certainly does not offend a litigant's constitutional right to due process to dismiss a plaintiff's cause of action without notice and a hearing. *Id.* at 1389-90. Thus, it is irrelevant whether other circuits may require district courts to provide such notice.

Furthermore, contrary to plaintiff's contention, this Court's holding in *Chambers* did nothing to alter the rule set forth in *Link*. Citing language from Justice Kennedy's dissent in *Chambers* out of context, plaintiff argues that the majority's holding in *Chambers* modified the ability of a lower court to *sua sponte* dismiss a plaintiff's case for failure to prosecute without providing the plaintiff prior notice. *See* plaintiff's petition, pp. 17-18. However, this clearly is not true. In fact, the issue before this Court in *Chambers* did not even concern the sanction of dismissal.

Rather, the issue this Court addressed in *Chambers* was whether a "District Court, sitting in diversity, properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses paid by the party's opponent to its attorneys." *Chambers*, 111 S. Ct. at 2128. In *Chambers*, this Court was concerned with whether the existence of other sanctioning schemes, such as the sanctions available under 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 11, displaced the inherent power of courts to impose attorneys' fees as a sanction for a litigant's bad faith conduct. *Id.* at 2134-36. In holding that these sanctioning mechanisms did not eliminate the inherent power of district courts to impose sanctions beyond what the other sanctioning mechanisms allowed, this Court cited *Link* merely for the proposition that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 111 S. Ct. at 2135. Specifically, this Court observed that "[i]n, *Link*, it was recognized that a federal district court has the inherent power to dismiss a case *sua sponte* for failure to prosecute, even though the

language of Federal Rule of Civil Procedure 41(b) appeared to require a motion from a party." *Chambers*, 111 S. Ct. at 2135.

Although Justice Kennedy's dissent in *Chambers* disagreed with the majority's reading of *Link*, neither Justice Kennedy nor the majority opinion in *Chambers* ever suggested that the majority intended to modify this Court's holding in *Link* by requiring that district courts provide notice before dismissing a case for failure to prosecute. Rather, Justice Kennedy merely disagreed with the majority's apparent suggestion that *Link*'s holding contravened a prior version of Federal Rule of Civil Procedure 41(b), which appeared to require a motion from a party before a case could be dismissed for failure to prosecute. *Chambers*, 111 S. Ct. at 2144 (Kennedy, J., dissenting). Specifically, Justice Kennedy stated that "contrary to the Court's characterization, the holding in *Link* turned on a determination that Rule 41(b) contained ***permissive*** language . . . which merely authorizes a motion by the defendant." *Chambers*, 111 S. Ct. at 2144 (Kennedy, J., dissenting) (emphasis in the original) (*citing Link*, 82 S. Ct. at 1388). Thus, while the majority opinion in *Chambers* interpreted *Link* as recognizing that district courts retain their inherent powers to sanction parties even when those powers might contravene the Federal Rules of Civil Procedure, Justice Kennedy concluded that *Link*'s holding did not contravene the Federal Rules of Civil Procedure because Rule 41(b) was not meant to abrogate the inherent powers of district courts and to provide the only means by which a case could be dismissed for a plaintiff's failure to prosecute. Hence, there simply is nothing in *Chambers* to suggest that this Court intended

to modify its holding in *Link* that district courts possess the inherent power to *sua sponte* dismiss a plaintiff's action for failure to prosecute without prior notice and a hearing. Accordingly, plaintiff's contention that the district court did not possess the power to *sua sponte* dismiss her cause of action without prior notice is clearly without merit.

2. The District Court acted well within the permissible range of its discretion in dismissing plaintiff's cause of action.

In *Link v. Wabash R.R.*, 370 U.S. 626, 82 S. Ct. 1386 (1962), this Court concluded that, whether an order *sua sponte* dismissing a plaintiff's case for failure to prosecute without affording the plaintiff notice or a hearing can stand on appeal "depends not on power but on whether it was within the permissible range of the court's discretion." *Id.* at 1390. This Court noted that, where the circumstances show that a party had knowledge of the consequences of his conduct, a district court does not abuse its discretion in sanctioning the party without advance notice and a hearing. *Id.*

In the instant matter, the district court clearly did not abuse its discretion in dismissing plaintiff's case without providing notice of its intent to do so. Indeed, after commencing this action in April, 2002, plaintiff did next to nothing to establish that she had a meritorious cause of action or to otherwise move this case forward. To the contrary, by filing frivolous motions and appeals and blatantly disregarding the district court's rules and orders, plaintiff succeeded only in delaying the ultimate resolution of this case. Although plaintiff's antagonistic

and insolent conduct towards the district court, alone, would suffice to support the court's dismissal of plaintiff's claims, an analysis of the factors outlined by the Court of Appeals for the Third Circuit in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), in the context of this case clearly supports the district court's decision.

In *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), the United States Court of Appeals for the Third Circuit outlined the following six (6) factors that district courts should consider when determining whether a plaintiff's failure to timely prosecute his claim or to obey court orders constitutes proper grounds for dismissal of his action:

> (1) the extent of the ***party's*** personal ***responsibility***;
>
> (2) the ***prejudice*** to the adversary caused by the failure to meet scheduling orders and respond to discovery;
>
> (3) a ***history*** of dilatoriness;
>
> (4) whether the conduct of the party or the attorney was ***willful*** or in ***bad faith***;
>
> (5) the effectiveness of sanctions other than dismissal, which entails an analysis of ***alternative sanctions***; and
>
> (6) the ***meritoriousness*** of the claim or defense.

Id. at 868 (emphasis in the original). However, "[t]he *Poulis* standard is not a 'mechanical calculation' for

deciding whether or not to dismiss a plaintiff's complaint, and 'not all of the *Poulis* factors need be satisfied in order to dismiss a complaint.'" *Smith v. Altegra Credit Co.*, 2004 U.S. Dist. LEXIS 21478, at *12 (E.D. Pa. September 23, 2004) (*quoting Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992)). Rather, the *Poulis* factors should be considered in the context of the district court's prolonged contact with the litigant to determine whether dismissal of a plaintiff's action is appropriate. *Mindek*, 964 F.2d at 1373. Moreover, when a litigant's conduct makes it impossible to adjudicate a case, it is unnecessary for a court to utilize the *Poulis* balancing test. *Sebrell v. Philadelphia Police Dep't*, 159 Fed. Appx. 371, 374 (3d Cir. 2005). "Ultimately, the decision to dismiss constitutes an exercise of the district court judge's discretion and must be given great deference by this Court." *Mindek*, 964 F.2d at 1373.

In the instant matter, from the inception of this case until the date it was dismissed, plaintiff exhibited an inexcusable history of dilatoriness and repeated violations the district court's rules and orders. For instance, although it was her obligation to move this case forward, plaintiff never produced any expert reports and took only one deposition during the entire four (4) year period that this case was before the district court. She also thwarted defendants attempts to conduct discovery by failing to participate in her Court-ordered deposition. In fact, other than taking a single deposition on March 20, 2003, the only action that plaintiff took with respect to this case was to file several frivolous motions with the district court and to file three (3) separate appeals to the United States Court of Appeals for the Third Circuit from various non-appealable orders.

Moreover, although plaintiff claimed that she needed to review the medical records from Lankenau Hospital to prepare her case, she failed to appear at a scheduled appointment to view the hospital chart without informing defense counsel that she would not show, in violation of the district court's November 26, 2003, discovery order. Plaintiff never explained to defense counsel or the court why she failed to appear at this appointment, nor did she request that the appointment be re-scheduled for another date.

Furthermore, at a conference before the district court on November 26, 2003, Judge Surrick specifically ordered plaintiff to produce a written report within seventy-five (75) days from a qualified medical professional stating that, after reviewing the Lankenau Hospital medical chart, there existed a reasonable probability that defendants breached applicable standards of medical care in treating plaintiff and that such alleged negligence was a proximate cause of plaintiff's purported injuries. *See* plaintiff's Petition for a Writ of Certiorari, App., p.14. Judge Surrick expressly warned plaintiff that her failure to comply with this Order would "result in the imposition of severe sanctions." *See id.* Nevertheless, plaintiff deliberately disregarded the court's Order and failed to provide any legitimate excuse for doing so. In fact, not only did plaintiff fail to produce the foregoing statement from a medical expert within seventy-five (75) days of the court's Order, but she also failed to produce the statement at any time thereafter.

In addition, on February 20, 2004, plaintiff failed to appear at a scheduled status conference before the

district court despite having nearly three (3) months of advanced notice of the conference date. Rather than contact the court to explain her absence or to request that the conference be rescheduled, plaintiff simply ignored the court and defense counsel in blatant disregard of the district court's authority. In fact, after failing to attend that conference, the only action which plaintiff took with respect to this case over the next twenty-six (26) months was to file her third appeal to the United States Court of Appeals for the Third Circuit from a non-appealable order. Certainly, plaintiff's conduct exemplifies a history of dilatoriness and failure to respect court orders that should not be tolerated. Thus, the third factor of the *Poulis* test certainly supports the district court's order of dismissal.

Moreover, as plaintiff is representing herself in this litigation, she clearly bears personal responsibility for her conduct in this matter. This certainly is not a case where the plaintiff's attorney is responsible for delaying litigation and violating court orders, while the plaintiff, herself, is innocent of any wrongdoing. To the contrary, as plaintiff is representing herself in this matter, she alone is responsible for the failure to move this case forward and her failure to respect the lower court's orders. Plaintiff is also not entitled to the leniency that federal courts typically grant to *pro se* litigants with respect to adhering to the technicalities of the Federal Rules of Civil Procedure since she, herself, is a practicing attorney and member of the Pennsylvania Bar. Furthermore, in any event, it is well-settled that all litigants, including *pro se*, have a duty to comply with court orders and must suffer the consequences of any failure to fulfill that duty. *Burns v. Glick*, 158 F.R.D.

354, 356 (E.D. Pa. 1994) (*citing McDonald v. Head Criminal Court Supervising Officer*, 850 F.2d 121, 124 (2d Cir. 1988)). Therefore, the first factor of the *Poulis* test certainly weighs in favor of the district court's order of dismissal.

Furthermore, the plaintiff's failure to comply with the district court's orders or to move this case forward has certainly caused defendants to suffer substantial prejudice. Federal courts have held that the prejudice prong of the *Poulis* test "does not require a showing of 'irremediable harm' to the opposing party." *Smith*, 2004 U.S. Dist. LEXIS 21478, at *15. "Rather, the imposition of a burden that impedes a party's ability to prepare effectively for trial is sufficient." *Id.* (*citing Ware v. Rodale Press, Inc.*, 322 F.3d 218, 223 (3d Cir. 2003)). Moreover, "'prejudice to defendants resulting from unreasonable delay may be presumed.'" *Shannon v. General Elec. Co.*, 186 F.3d 186, 195 (2d Cir. 1999) (*quoting Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1996)). Instantly, plaintiff's failure to attend scheduled conferences, to testify at her deposition, or to comply with discovery orders, has severely prejudiced defendants by hampering their ability to effectively prepare a defense strategy and to move this case toward trial. *Cf. Ware*, 322 F.3d at 222; *Smith*, 2004 U.S. Dist. LEXIS 21478, at *16-17. Indeed, as the alleged negligence at issue in this case took place more than eight (8) years ago, plaintiff's prolonged delay certainly has resulted in the loss of evidence which supports defendants' case and the inability of defense witnesses to accurately recollect the events at issue. Moreover, plaintiff's conduct has further prejudiced defendants by causing them and their insurers to

unnecessarily expend significant time and money defending against an action that is completely devoid of merit. *See Smith*, 2004 U.S. Dist. LEXIS 21478, at *18 ("Prejudice to an opposing party includes unnecessary financial burdens imposed because of Plaintiff's misconduct.") (*citing Adams v. Trustees of the N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 874 (3d Cir. 1994)). Therefore, the second factor of the *Poulis* test certainly supports the district court's order of dismissal.

In addition, plaintiff's failure to attend the court's scheduling conference, to participate in her deposition, or to abide by the lower court's discovery orders must be deemed to have been willful and in bad faith. Indeed, plaintiff does not deny that she understood these court directives, nor that she had adequate time to comply with them. Nevertheless, she blatantly failed to obey the lower court's orders or to move this case forward without providing any legitimate excuse for her conduct. Under the circumstances, it must be presumed that plaintiff's misconduct was done willfully and in bad faith. Thus, the fourth factor of the *Poulis* test certainly weighs in favor of the district court's order of dismissal.

Moreover, as the district court noted in its Opinion, alternative sanctions would not have been viable or effective in this case. Indeed, while her action was pending before the lower court, plaintiff showed a complete disdain for the district court's authority by repeatedly ignoring court orders, failing to appear at conferences and depositions, filing frivolous appeals and motions, and failing to conduct any substantive discovery. In fact, as the district court noted, for more

than two (2) years before her action was dismissed, plaintiff failed to take any action at all to move this matter towards trial. Hence, plaintiff would certainly have ignored any alternative sanctions imposed by the district court. Therefore, the fifth factor of the *Poulis* test certainly supports the district court's order of dismissal.

Finally, after more than four (4) years of litigation plaintiff clearly failed to establish that her cause of action had even the slightest hint of merit. In fact, when directed by the district court to produce an affidavit of merit by a licensed medical professional which supported her medical negligence claims against defendants, plaintiff completely ignored the court's order. Plaintiff had over four (4) years to conduct discovery and produce expert reports which supported her cause of action, yet she failed to produce even a scintilla of evidence or a one paragraph expert report to support her claims. Thus, the sixth factor of the *Poulis* test certainly weighs in favor of the district court's order of dismissal.

In light of the above, it is clear that a consideration of the *Poulis* factors in the context of this case more than supports the district court's order of dismissal. Moreover, contrary to plaintiff's contention, the district court sufficiently notified plaintiff of the possibility that her case could be dismissed by admonishing her that her failure to comply with the court's November 26, 2003, order would "result in the imposition of severe sanctions." *See* plaintiff's Petition for a Writ of Certiorari, App., p.14. Thus, the district court clearly did not abuse its discretion by dismissing plaintiff's cause of action.

B. The District Court Did Not Apply a Different Standard to Plaintiff as an Attorney *Pro Se* Litigant Than the Court Would Apply to a Lay *Pro Se* Litigant.

Plaintiff's next argument is that the district court erred by failing to apply the same standards to an attorney *pro se* litigant that are generally applied to lay *pro se* litigants during the course of the litigation. Specifically, plaintiff maintains that the district court erred by denying her certain privileges customarily granted to *pro se* litigants because of her status as an attorney. Therefore, plaintiff contends that this Court should review this matter to determine if she was denied equal protection under the law. However, plaintiff's argument is clearly without merit.

Indeed, contrary to plaintiff's contention, the district court never treated her differently than other *pro se* litigants merely because of her status as an attorney. Notably, the only example that plaintiff cites of this purportedly disparate treatment was the district court's directive that any attorney representing plaintiff must be a member of the district court's bar. This directive was certainly proper.

Indeed, it is well-settled that attorneys must be admitted to the bar of any court in which they intend to give legal counsel to a client. In the United States District Court for the Eastern District of Pennsylvania, attorneys are permitted to represent clients in civil proceedings provided they meet the requirements of Local Rule of Civil Procedure 83.5. These requirements are not difficult to satisfy, but they are clearly mandatory. *See* E.D. of Pa. R. Civ. P. 83.5.

In the instant matter, plaintiff contends that the district court erred by denying her the right to have legal counsel of her choice represent her at her discovery deposition. However, this clearly is not true. Indeed, to the contrary, the district court merely required that any attorney purporting to represent plaintiff in this matter be admitted to the district court before offering her legal counsel. This requirement was neither difficult for plaintiff to satisfy, nor did it prejudice her in any way. In fact, the requirement was actually made in plaintiff's best interests to ensure that anyone intending to give her legal advice concerning this case be a qualified attorney in good standing in the legal community. Notably, plaintiff has not addressed the district court's actual ruling in her appellate brief, nor has she given any explanation as to how the district court's ruling prejudiced her case. Therefore, this allegation or error is clearly without merit and does not constitute a compelling reason for this Court to review this matter.

C. The District Court Did Not Err in Denying Plaintiff's Motion for the Entry of a Default Judgment Against Defendants.

Plaintiff's final argument is that the district court erred by denying plaintiff's motion to strike defendants' answers to plaintiff's complaint and to enter a default judgment in plaintiff's favor. Specifically, plaintiff contends that district court abused its discretion by failing to enter a default judgment against defendants after defendants filed various responses to plaintiff's Amended Complaint in August, 2002. Plaintiff asserts that she filed and served her initial pleadings in late July, 2002, and, therefore, defendants were a few days

late in filing their responses with the court. Plaintiff maintains that defendants' delay in filing responses to her initial pleadings warranted the entry of a default judgment in plaintiff's favor. However, plaintiff's argument is clearly without merit.

It is of course well-settled that federal courts generally disfavor the entry of default judgments and desire that litigants resolve their disputes by reaching a decision on the merits. *Gross v. Stereo Component Sys.*, 700 F.2d 120, 122 (3d Cir. 1983) *(citing Farnese v. Bagnasco*, 687 F.2d 761, 764 (3d Cir. 1982)). *See also Tecmarine Lines, Inc. v. CSX Intermodal, Inc.*, 2001 U.S. Dist. LEXIS 12398, at *3 (E.D. Pa. August 13, 2001). To determine whether a default judgment should be granted, district courts should consider the following three (3) factors:

> (1) [the] prejudice to the plaintiff if default is denied,
>
> (2) whether the defendant appears to have a litigable defense, and
>
> (3) whether defendant's delay is due to culpable conduct.

Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000). The district court's refusal to enter a default judgment should only be overturned if the lower court abused its discretion. *Id.*

In the instant matter, as a preliminary matter, Dr. Glassner certainly was not late in filing a response to plaintiff's Amended Complaint. Indeed, plaintiff filed her

initial pleadings on April 2, 2002, but apparently did not attempt to serve her Complaint on defendants. She then filed an Amended Complaint on July 22, 2002, and served defendants with copies over the next two (2) days. However, before defendants were required to file responses to plaintiff's Amended Complaint, plaintiff filed a Second Amended Complaint on August 12, 2002. Dr. Glassner then filed a Motion to Dismiss plaintiff's pleadings, pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(f), on August 29, 2002. After the district court denied Dr. Glassner's motion on October 18, 2002, Dr. Glassner timely filed an Answer with Affirmative Defenses to plaintiff's Second Amended Complaint on October 29, 2002. Thus, contrary to plaintiff's argument, Dr. Glassner clearly filed his response to plaintiff's pleadings in a timely fashion.

Moreover, in any event, plaintiff certainly has not established that the district court abused its discretion by failing to enter a default judgment against any defendant. Indeed, plaintiff has not even alleged, much less established through any sort of evidence, that the district court's denial of her motion for a default judgment caused her to suffer any prejudice. In fact, it is difficult to fathom what sort of prejudice plaintiff could have suffered when all defendants had filed responses to plaintiff's pleadings by the beginning of December, 2002. It is especially evident that plaintiff did not suffer any prejudice by the denial of her request for the entry of default judgments given that she failed to take any action to move this case forward over the next three (3) and a half years after she filed her Second Amended Complaint. "Prejudice to the plaintiff occurs when relief would hinder the plaintiff's ability to pursue

its claims through loss of evidence, increased potential for fraud, or substantial reliance on the default." *Tecmarine Lines, Inc.*, 2001 U.S. Dist. LEXIS 12398, at *6. As set forth in section A above, any hindrance in plaintiff's ability to pursue her claims was due to plaintiff's own conduct, or lack thereof. Thus, the district court's ruling certainly did not cause plaintiff any prejudice.

Furthermore, plaintiff has also not denied that defendants presented a meritorious defense to each of her negligence claims. To satisfy this prong of the test, a "defendant need not establish the merit of its defense; rather, he must only offer a defense which, if successful at trial, would completely bar the action." *Id.* at *3-4. Instantly, Dr. Glassner did just that by responding to plaintiff's allegations of negligence with multiple affirmative defenses and by asserting that his medical treatment of plaintiff did not breach applicable standards of medical care. As plaintiff has not offered any evidence, or even argument, to suggest that defendants did not have a meritorious defense to plaintiff's claims, this prong of the default judgment test certainly favors the district court's ruling.

Finally, plaintiff has not presented any evidence or argument to suggest that any delay in defendants' filing of responses to her pleadings was caused by any culpable conduct. "A defendant exhibits culpable conduct if he fails to respond to the complaint willfully, in bad faith, or as part of trial strategy." *Id.* at *7 (*citing International Bhd. of Elec. Workers, Local Union 313 v. Skaggs*, 130 F.R.D. 526, 529 (D. Del. 1990)). Instantly, it is difficult to conceive of how defendants could have

gained any tactical advantage over plaintiff by filing their answers to her pleadings when they did. In fact, plaintiff does not even claim that defendants gained any such advantage. Moreover, plaintiff has not produced any evidence which even remotely suggests that defendants willfully delayed in responding to her pleadings or did so in bad faith. Therefore, this prong of the default judgment test certainly supports the district court's denial of plaintiff's motion.

In light of the above, it is clear that the district court did not abuse its broad discretion in denying plaintiff's motion for the entry of a default judgment against defendants. Therefore, plaintiff's final allegation of error is clearly without merit and does not constitute a compelling reason for this Court to review this matter.

CONCLUSION

Plaintiff clearly has failed to meet her burden of establishing that compelling reasons exist for why her Petition for a Writ of Certiorari should be granted. Consequently, for all of the foregoing reasons, respondent/defendant, Michael J. Glassner, M.D., respectfully requests that this Honorable Court deny plaintiff's Petition for a Writ of Certiorari.

Respectfully submitted,

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(4)

No. 08-73

FILED
SEP 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CONNIE C. RESHARD,

PETITIONER,

VERSUS

MAIN LINE HOSPITALS INCORPORATED d.b.a./a.k.a., MAIN LINE HEALTH AND THE LANKENAU HOSPITAL, DR. MICHAEL J. GLASSNER, DR. JOHN F. SCHILLING, MARK E. SCOTT, D.O., DR. KIMBERLY M. LENHARDT, DR. THOMAS J. MEYER, PULMONOLOGY ASSOCIATES, INC., AND DR. GEOFFREY P. TREMBLAY,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY
TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

CONNIE C. RESHARD,
PETITIONER, *PRO SE*
1435 4TH Street, SW
Washington, DC 20024
202-554-9222

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I. SUMMARY

Petitioner believes that her petition for a *writ of certiorari* should be granted and the information contained in her Reply supports or otherwise explains her conduct in this case.

It is compelling that the majority of judges in federal courts do not support the dismissal of a case for not attending proceedings ordered by the court under circumstances presented in this case for a failure to prosecute. Some legal commentators believe that the requirements of appellate review under the collateral order doctrine are unclear or not uniformly administered in the federal judiciary. Some legal commentators recommend the use of the All Writs Act, *e.g.*, *writ of mandamus* device for obtaining appellate review during the course of the case, especially in the area of discovery.

I believe my use of the device is not an example of a delay tactic. Petitioner acted prudently when she sought review under the All Writs Act regarding discovery requests from Dr. Michael Glassner's counsel regarding for example medical records at Lankenau Hospital, records whose existence had not been identified in the medical records given to her. ***Emphasis Added.*** Therefore, she had a right to review them first in order to determine whether there was information requiring legal non-disclosure even to the parties in the case.

Petitioner also acted reasonably and in good faith regarding two major issues related to the tenure of Senior Judge Robert F. Kelly in the above

styled case. If a patient with a clinical history seeks medical treatment and that fact is known to the district court and to the parties prior to another party's requirement to attend her deposition, it seems reasonable that the party is unable for medical reasons to attend the deposition or to provide her status to the district court and to the other parties contemporaneously. She did the best she could and believed that she would be afforded some degree of deference under the circumstances.

II. A CASE SHOULD NOT AUTOMATICALLY BE DISMISSED FOR MISSING A HEARING

The district court dismissed the case under Rule 41(b), Fed. R. Civ. P. for failure to prosecute, finding that petitioner acted intentionally in bad faith or intentionally used delay devices. This is certainly not true in this case. According to some commentators, a claim of failure to prosecute under *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962) is not automatic. *See* David F. Herr, Roger S. Haydock, Jeffrey W. Stempel, *Motion Practice*, § 16.04 (B), pp. 16-67 (Aspen Publishers Online 4th ed. 2001).

> "Lower Courts interpreting the case have concluded that missing a court proceeding, even without an acceptable excuse, does not in and of itself justify dismissal even though the nonattendance violated at least one court order as well."

Since the entire process depends on balancing the need for orderly disposition of the case, rarely are cases similar to this case dismissed for failure to prosecute. *Id.* I believe that the reason for a lack of

an opinion of this nature is that detailed opinions are not issued in the district court to dispose of such cases and such cases are not appealed.

The fact that petitioner believed that there was putative jurisdiction under the collateral order doctrine should be viewed as an act of good faith and not an act used as a delay tactic. This is the case presented, even though the United States Court of Appeals for the Third Circuit did not agree with petitioner's interlocutory appeal regarding the right of a *pro se* attorney litigant to seek immediate appellate review. The right to proceed *pro se* is a product of common law dating to the early days of this country and English common law going back centuries. It is codified under what is now Title 28, Section 1654 of the United States Code as one of the first judicial acts of our Congress under the new Constitution in 1789 in the First Judiciary Act. Section 35 of the 1789 Act stated:

> "That in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

By assistance as in the current statue does not mean exclusively but could be interpreted inclusively to include oneself and third–party counsel as in jointly. Section 1654 confers a high standing in our system of judicial governance and Constitutional protections.

By appealing the issue surrounding my deposition including the appearance of counsel by *pro hac vice* to provide assistance to a *pro se* litigant

and by the district court judge's prior ruling indicating that the use of counsel would be permitted provided that he or she were admitted to practice before the district court, petitioner should have been protected from a determination that she acted in bad faith or that she acted to delay the proceedings, in a subsequent order of dismissal for failure to prosecute the case.

Some commentators advocate changing the current system noting that the All Writ Act could be used for appellate review of certain interlocutory orders and that the interpretation of the collateral order doctrine has mixed results. *See*, Steinman, Adam, "Reinventing Appellate Jurisdiction" *Boston College Law Review*, Vol. 48, 2007, p.1237. Clearly there is support that the deposition issue is not and should not be considered an act of bad faith by acting to protect oneself with the assistance of counsel at the March 31, 2003 deposition as well as due to illness for her scheduled deposition on February 27, 2003.[1]

---

[1] It is documented that petitioner has a clinical history that includes serious medical issues. I felt ill including chest pain and wanted to get checked by a doctor **before** I could feel safe driving to Philadelphia for my deposition early the next morning on February 27, 2003.

This is reasonable behavior in my view and I thought that I would have been given the benefit of the doubt because I had notified both Senior Judge Robert F. Kelly and the parties that I was experiencing a medical episode of some level. I went to the hospital on February 26, 2003 and was admitted by my doctors. My doctors made the decision such after examination and after reviewing my clinical history dating back to April 2000 when I had to be admitted to Georgetown for about three-weeks subsequent to my discharge from Lankenau Hospital on April 18, 2000.

Petitioner has also been criticized for using the All Writs Act to resolve discovery issues, a device that is not inconsistent with the judicial and statutory policy against piece-meal judicial administration. Petitioner could have disclosed information that could be used to impact future case strategy by defense counsel at a significant level. It could be argued that immediate discretionary appellate review either by the All Writs Act or collateral order review would be judicially efficient and fair to the parties by eliminating an unfair advantage to the defense counsel or by reducing cost of an entire re-trial based on faulty premise that the status quo would be maintained when the effect of the new trial under the corrected rule of law occurs but the outcome has been sufficiently diminished in bringing about true justice as well as the tenet that "justice delayed is justice denied."

III. PETITIONER ACTED IN GOOD FAITH

In all respects, I acted in good faith. For example regarding my deposition scheduled for March 31, 2003, I took the necessary steps to obtain counsel during the 11 or so days from the March 18, 2003 teleconference call between the parties and Senior Judge Robert F. Kelly when my deposition was set for March 31, 2003 and Dr. Kimberly

---

My treatment at Lankenau Hospital lead to issues raised in this case. Doctors at Georgetown made a determination to admit me as a patient, evidenced by my wrist identification bracelet. *See Hospital Patient Band Indicating Admission On February 26, 2003,* Reply App. at 5.

My doctors discharged me late afternoon on February 27, 2003. I felt really ill after the test given me during the hospital stay and went to bed when I arrived home. I stayed in bed for several days thereafter. I did the best I could given the manner in which the facts unfolded.

Lenhardt's deposition was scheduled for March 20, 2003.

I met with Hughie Hunt later that afternoon on March 27, 2003 at his office in College Park, Maryland and prepared a motion for him to appear *pro hac vice*. Later that same day, I filed the motion via next day morning delivery for March 28, 2003, by 10:00am via Federal Express service. *See, Motion to Appear Pro Hac Vice, March 27, 2003* at Reply App. 1-4.

On Friday, March 28, 2003, I verified that delivery occurred at about 9:16am. Later that day, Hughie Hunt telephoned me about the status of the motion. I made a teleconference call with Mr. Hughie Hunt to the following telephone numbers on Friday, March 28, 2003: first call was made to 267-299-7007, Joseph Lavin, the case manager for *Reshard v. Lankenau Hospital, et al.*, Case No. 02cv1787; the second call was made to 215-597-0736, Senior Judge Robert F. Kelly's chamber, the judge of record at that time. Both numbers appeared on my telephone bill for 202-484-7002. *See, Telephone Bill Dated April 16, 2003* at Reply App-4.

I made every effort to facilitate the processing of the motion prior to my deposition on Monday, March 31, 2003. I followed what I believed to be the necessary action to preserve the status quo in the case while staying within the rules of acceptable conduct and decorum. For example, Senior Judge Kelly and I may not see the facts in the same manner. However, I can only present the facts as I believe they occurred, based upon my knowledge and belief.

IV. CONCLUSION

Petitioner urges the Court to grant her petition and issue a *writ of certiorari*. The issues present areas of the law that are being treated differently among the Circuits. All of the issues presented in my view support judicial intervention by the Supreme Court of the United States.

Further, the discussion presented, in my view, demonstrates the level of integrity and decorum exemplified by petitioner that does not support findings that I acted to delay the case or that I acted in bad faith in handling any matter in this case.

APPENDIX

March 28, 2003 Motion To Appear Pro Hac Vice

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYYLVANIA

APPLICATION FORM FOR THOSE ATTORNEYS SEEKING TO PRACTICE IN THIS COURT PURSUANT TO LOCAL RULE OF CIVIL PROCEDURE 83.5.3(b)

I. APPLICANT'S STATEMENT

_____I, the undersigned, am an attorney who is not currently admitted to either the bar of this court or the bar of the Supreme Court of Pennsylvania, and I hereby apply for admission to practice in this court pursuant to Local Rule of Civil Procedure 83,5,2(b), and am submitting a check, number_____, for the $40.00 admission fee.

A. *I state that I am currently admitted to practice in the following state jurisdictions:*

Maryland, Admission date: 4/20/01, Attorney Identification Number: 15030.

Georgia, Admission date: 1/15/03, Attorney Identification Number: 442214

B. *I state that I am currently admitted to practice in the following federal jurisdictions:*

Maryland, Admission date: 4/20/01, Attorney Identification Number: 15030

District of Columbia, Admission date: 2/03/01, Attorney Identification Number: 15030

C. *I state that I am at present a member of the aforesaid bars in good standing, and that I will demean myself as an attorney of this court uprightly and according to law, and that I will support and defend the Constitution of the United States.*

/s/

Applicants Signature

Date: March 27/2003 (handwritten by Mr. Hughie Hunt)

APPLICANT'S OFFICE ADDRESS AND TELEPHONE NUMBER:

Kemet & Hunt PLLC
4920 Niagara Rd. Ste. 322
College Park, MD 20740
(301) 962-0888

(Page 1)

B. SPONSOR'S STATEMENT, MOTION AND CERTIFICATE

The undersigned member of the bar of the United States District Court for the Eastern District of Pennsylvania hereby moves for the admission of Hughie Hunt to practice in said court pursuant to Local Rule of Civil Procedure 83.5.2(b), and certify that I know (or after reasonable inquiry believe) that the applicant is a member in good standing of the above referenced state and federal courts and that the applicant's private and personal character is good. I certify that this application form was on this date mailed, with postage prepaid, to all interested counsel.

Sponsor's name: Connie Reshard, Sponsor's signature: /s/, Admission date: 11/18/87, Attorney Identification NO.: 50327.

SPONSOR'S OFFICE ADDRESS AND TELEPHONE NUMBER: 1101 3rd St., SW No. 812, Washington, DC 20024
(Page 2)
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION
Connie Reshard
v.
Main Line Hospitals, Inc. et. al
NO. 02CV1787
CERTIFICATE OF SERVICE
I declare under penalty of perjury that a copy of the application of Hughie Hunt Esquire, to practice in this court pursuant to Local Rule or Civil Procedure 83.5.2(b) and the relevant proposed Order which, if granted, would permit such practice in this court was mailed today with postage prepaid to: see attached.
Signature of Attorney: /s/
Name of Attorney: Hughie D. Hunt II (Handwritten)
Signature of Attorney: /s/
Name of Attorney: Connie C. Reshard
Date: 3/27/03 (Handwritten)
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One S. Broad St., Ste. 1830
Philadelphia, Pennsylvania 19107

Long Distance Telephone Bill From Verizon For Sprint Dated April16, 2003 for 202-484-7002

Sprint Invoice Account Summary (Redacted)
Calls from 202-484-7002 (Redacted)
No. 16, Date: 3/28, Time: 4:53pm, Place and Number Called: Phila, PA, 267-299-7007, Type: Direct, Rate: Day, Minutes: 2, Amount: $.14.
No. 17, Date: 3/28, Time: 4:55pm, Place and Number Called: Phila, PA, 215-597-0736, Type: Direct, Rate: Day, Minutes: 2, Amount: $.14.

March 29, 2003 Letter To Michael Kunz, Clerk Of The United District Court For The Eastern District Of Pennsylvania

March 29, 2003

Certified Mail and Return Receipt/Hand Delivery on March 31, 2003
Michael E. Kunz, Clerk,
United States District Court
Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19106-1797

Re: Connie C. Reshard vs. The Lankenau Hospital, *et al, No. 02cv1787*

Dear Mr. Kunz:
On March 27, 2003, I submitted a Motion for *Pro Hac Vice* on behalf of Hughie Hunt to appear in the above styled case. See the Enclosed copy of the same. The document was delivered by Federal Express and signed for on March 28, 2003 at 9:16am. See the Enclosed Copy. A Motion for Authorization was already on file at docket no. 107 on March 25, 2003. Both Mr. Hunt and I attempted to walk the motion through as the hearing is scheduled for March 31, 2003. Yet based on telephone communications with staff including Joseph Lavin and a law clerk in Judge Kelly's chambers, the motion was no where to be found. Joseph Lavin said that [had to call] Judge Kelly 's chambers. One of Judge [Kelly]'s law clerk said they did not see it on the docket and had never heard of the Motion. You can see the situation is critical because I have been deprived of assistance of counsel in this matter for a legal proceeding. Please determine what happened. A copy of the last page of a PACER report shows that the Motion was not docketed. Please correct this situation immediately. How could this have happened?
Respectfully yours,
Connie C. Reshard
CCR/ccr
Enclosures (omitted here)
cc: The Honorable James T. Giles, Chief Judge
Daniel Ryan
J. Gallo
Sharon Reiss
Kyle Thompson

George Young

April 3, 2003 Facsimile To Hughie Hunt

April 3, 2003

Via Facsimile
Mr. Hughie Hunt
Kemet & Hunt PLLC
4920 Niagara Road, Suite 322
College Park, MD 20740
Re: Connie Reshard v. Lankenau Hospital, et al.,
No. 02-Civ-1787
Dear Mr. Hunt:
[Redacted]
Also, I wrote the clerk of the district court and the chief judge of the district court, advising them that the application for your appearance *pro hac vice* was received at [9:16am] on March 28, 2003. As you are aware based on our conference call to the Court on March 28, 2003, the motion was not docketed. J. Lavin said the judge had it and the judge's clerk said that they had never heard of it. The motion is now docketed as of April 1, 2003.
Sincerely,
/s/
Connie Reshard, Esq.
Enclosure
Cc: File
Fax
To: Hughie Hunt
From: C. Cornelia Reshard, Esq.
Date: April 3, 2003
Fax: 301-542-0005
Phone: 301-982-0888

Re: Reshard v. Lankenau, et al., 02cv1787
See attached letter regarding the taking of Connie Reshard's deposition.
Fax Confirmation
Date Apr 3
Time 7:13am
Type Fax Sent
Identification 10108111-301-342-0005
Duration 2:20
Pages 5
Result OK

February 26, 2003 Medical Arm Band Indicating Petitioner Admitted To Hospital

Reshard, Connie C
MRN Number: XXXX-707
Address: 1101 3rd St SW #812
Acct. Number: XXXX6703
Washington, DC 20024
DOB: 12/27/XXX
SSN: 263-XX-XXXX
Sex: F
Age: 55
Attending Physician: XXXXXX, Brendan R.
Admit Date: 02/26/03

Supreme Court U.S.
FILED
OCT 2 1 2008
OFFICE OF THE CLERK

No. 08-73

In the Supreme Court of the United States

CONNIE C. RESHARD,

PETITIONER,

VERSUS

MAIN LINE HOSPITALS INCORPORATED d.b.a./a.k.a., MAIN LINE HEALTH AND THE LANKENAU HOSPITAL, DR. MICHAEL J. GLASSNER, DR. JOHN F. SCHILLING, MARK E. SCOTT, D.O., DR. KIMBERLY M. LENHARDT, DR. THOMAS J. MEYER, PULMONOLOGY ASSOCIATES, INC., AND DR. GEOFFREY P. TREMBLAY,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING
PETITION FOR WRIT OF CERTIORARI

CONNIE C. RESHARD,
PETITIONER, *PRO SE*
1435 4TH Street, SW
Washington, DC 20024
202-554-9222

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I. SUMMARY

Petitioner urges the Court to reconsider and grant a petition for a *writ of certiorari*. Petitioner recognizes that it is not the responsibility of this Court to hear all valid cases. However, when the case confers a manifest injustice on one party that is so repugnant to the principals of democracy, I would suggest and hope that this Court would grant the petition in this instance.

It is compelling that several recent decisions in the United States Court of Appeals for the Third Circuit were decided in a manner inconsistent with the decision in this case. While I consistently disagree with the lower courts' findings about my behavior in managing the litigation, neither of them properly balanced such factors to the issue of the merits in the case. The longstanding presumption in federal courts is that the complaint is taken as true and that the judicial preference is to determine cases on the merits. Instead, both lower courts acted inconsistently with such principles of federal jurisprudence, by subordinating the merits of the case to a subjective determination when concluding that there was no proven basis indicating that the case is meritorious. Under the circumstances the appropriate source was the amended complaint in the case based on the stage of the litigation prior to the completion of discovery.

It is also compelling that the majority of judges in federal courts do not support the dismissal of a case for not attending proceedings ordered by the

court under circumstances presented in this case for a failure to prosecute. Just weeks ago, the Third Circuit did not appear to follow the *Poulis* principles in the same context as it did in my case. The principle of equal justice under law confers a guiding rule that manifest injustice in any case should not be tolerated.

II. RECENT THIRD CIRCUIT CASES SHOW INCONSISTENT RESOLUTION OF FAILURE TO PROSECUTE CASES UNDER RULE 41(b).

Petitioner asserts that several recent rulings by the Third Circuit in failure to prosecute cases underscore three principles not adequately addressed in this case: failure to consider actions Petitioner took to comply with the lower courts order including the interlocutory appeal, the failure to consider and take as true the merits of the case based upon the Amended Complaint and the failure to balance the merits against other factors.

The ruling in *N'Jai v. Floyd, et al., Sl Op., No. 08-2366, (Third Cir. October 16, 2008),* represents a departure from the standard the Third Circuit applied in this case. In that case, the district court dismissed the complaint with prejudice, after the plaintiff failed to file an amended complaint. The Third Circuit remanded the case. It noted that the *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 869 (3d Cir. 1984) standards had not been applied and suggested that the district court consider N'Jai's Notice of Appeal and Response regarding her attempt to enlarge the time in which to file the amended complaint. *See Note 1, Sl Op* at p. 4. Clearly, Petitioner attempted to mitigate the

situation by filing an interlocutory appeal with the Third Circuit. The Third Circuit does not have a blanket rule prohibiting the interlocutory review of discovery orders. *See, Smith v. Bic. Corp.*, 869 F.2d 194, 198 (3d Cir. 1989).

In my situation, I explained that the less than ten days provided by the district court judge were inadequate for providing the production with electronic discovery, specifically since the district court order made it clear that no changes would be accommodated. *Pet. App. 20; see also New Rules Applicable To The District Court for the Eastern District of PA at App. pp. 5-7.* Thus, no matter what I did I would have failed to comply with the district court's order. The fact that I filed an appeal should carry some weight since Judge Surrick's orders regarding discovery did not allow any changes in the provisions, constructively prohibiting a motion for an enlargement of time (and the defendant hospital would not schedule additional production dates without leave of court.)

This expected outcome is confirmed by the fact that Petitioner contacted counsel for Lankenau Hospital and Dr. Lenhardt many times since July 2002 regarding a complete certified true medical record for Petitioner. *App. at pp. 4-5.* During the March 20, 2003 deposition, it was clear that significant portions including electronic portions of the record were missing from the set provided to me that day. I specifically on the record requested the production of the true and complete set of medical records and sent a follow-up letter. *App. at p. 3.*

In another case the Third Circuit held that a district court must balance the *Poulis* standard, in particular consider the merits of the case based on

the statements contained in the complaint. *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008). The recent ruling by the Third Circuit in *Hernandez v. Palakovich, et al. 2008 U.S. App. LEXIS 20117* (No. 06-2060, September 19, 2008), Sl Op at p. 7. specifically stated in note 3 that the district court was required to take as true the facts presented in the complaint in assessing the merits. It stated: "For the purposes of this appeal, we take the allegations of the complaint as true..." In this case, the Third Circuit stated that it could not assess the merits of the case because it could not determine the merits from the record. *Pet. At App. at p. 4.* More importantly, the Third Circuit recently ruled that it has never held that lack of merit could be a determinative factor for dismissal under Rule 41(b), Fed. R. Civ. P. Yet in my case it held that it could not assess the merits based upon the record for certain, therefore that factor was not used to mitigate other factors. *Tucker v. Monroe*, 2008 U.S. App. LEXIS 17373 at Note 2, (No. 07-4385, August 12, 2008, Third Circuit) The decision in Petitioner's case is inconsistent with the application of *Poulis* in the most recent cases decided in the Third Circuit.

Consider also that Petitioner's interlocutory appeals that were pending until December 2004 and the objections to the November 26, 2003 order requiring a certificate of merit were the equivalent to responses to the district court order but such factors were not considered. It was the district court that was required to act subsequent to that time. *See, Hernandez v. Palakovich, et al.* at p. 7. (the failure of the district court to consider other pending pleadings was the equivalent to a response). In fact counsel for Dr. Michael Glassner asked the district court to hold

a status conference in March 2006. I was not the only party who believed that the district court judge was the party required to take action. Therefore, I was not required to do anything in order to avoid a failure to prosecute.

III. PETITIONER'S ACTIONS COULD NOT BE PREJUDICIAL TO RESPONDENTS UNDER POULIS WHEN THEY CLEARLY ACTED IN BAD FAITH.

In all respects, I acted in good faith. However, the defendants present issues of bad faith from the beginning. Lankenau Hospital, Dr. Kimberly Lenhardt and Dr. Michael Glassner through their respective attorneys initiated unauthorized discovery when each of them served discovery under the Pennsylvania Rules of Civil Procedure in August 2002, just weeks after service of process in the case including to parties who would not file timely Answers. *App. at pp. 1-3.* None of them had the authority to do so under Rule 26, Fed. R. Civ. P. Yet counsel for Lankenau Hospital filed on December 5, 2002 a motion to compel without disclosing this information about the discovery. Senior District Court Judge Robert F. Kelly granted the motion and did not vacate the order once the information was brought to his attention. I had treated the discovery requests as invalid since both of them were invalid. Glassner's counsel did re-file certain of its discovery but Lankenau Hospital and Dr. Lenhardt's counsel never re-filed such discovery. Petitioner could not have acted in bad faith regarding such discovery requests. However, clearly three parties to this litigation acted in bad faith.

Petitioner repeatedly requested complete medical records from Lankenau Hospital as indicated by an August 5, 2002 letter to the Hospital's counsel, Sharon Reiss and a March 24, 2003 letter to Paul Wright after the deposition of Dr. Lenhardt on March 20, 2003. *App. at pp. 3-5.* At the Lenhardt deposition, Dr. Lenhardt confirmed that the alleged complete medical record given to her did not contain information that she needed to respond to certain questions, *e.g.*, entire sections of the record were missing, *i.e.*, from April 4, 2000 to April 9, 2000, prior to the diagnosis that Petitioner had pulmonary emboli in both lungs.

When the district court judge ordered a certificate of merit on November 26, 2003, he set certain timeframes including the provision of the complete medical records by Lankenau Hospital by December 9, 2003. Pet. App. at 20. Again, that order also stated that no changes to timeframes provided would be changed. *Id.* I contend that the medical records subsequently provided at this time are still not complete. Further, I could not provide computer experts within that timeframe of December 9, 2003 for a number of reason including the process of indemnification of the computer forensic firm, the lack of prior knowledge of electronic details, information previously requested by interrogatories and production of documents from the hospital. Despite such protestations, I was not given additional time. How was I obligated to do anything further? I took the matter to the Third Circuit but the matters would be dismissed for lack of finality. The application of Rule 41(b), Fed. R. Civ. P. did not apply to this case under the circumstances. Similarly, the Third Circuit does not have a blanket

rule that discovery orders are not appealable. *See Smith v. Bic. Corp.*, 869 F.2d 194, 198 (3d Cir. 1989).

IV. CONCLUSION

Petitioner urges the Court to grant her petition and issue a *writ of certiorari*.

CERTIFICATION OF COUNSEL

Pursuant to Rule 44 (2), I certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay.

Connie C. Reshard

APPENDIX

August 1, 2002 Letter From Counsel For Lankenau Hospital And Dr. Kimberly Lenhardt, Sharon Reiss To Petitioner

POST & SCHELL pc
Attorneys at Law

Sharon M. Reiss
Direct Dial: 215-587-1047
Fax Number: 215-587-1444
Sreiss@postschell.com
File #114339
August 1, 2002
Connie C. Reshard
1101 Third Street, SW, No. 812
Washington, D.C. 20024
Re: Reshard v. The Lankenau Hospital, et al
Dear Ms. Reshard:
Enclosed please find our Interrogatories, Supplemental Interrogatories, Expert Witness Interrogatories and Request for Production of Documents of Defendants, Lankenau Hospital, et al directed to Plaintiffs. Please answer these interrogatories within the time prescribed by the Pennsylvania Rules of Civil Procedure
Thank you for your anticipated cooperation in this matter.
Very truly yours,
/s/
Sharon M. Reiss
SMR:flb
Encl.

1800 John F. Kennedy Boulevard Philadelphia, PA 19103-7480 215.587.1000 www.postschell.com
A Pennsylvania Professional Corporation

August 13, 2002 Letter From Counsel For Dr. Michael Glassner, Nancy K. Raynor To Petitioner

O'BRIEN & RYAN, LLP
ATTORNEYS AT LAW
HICKORY POINTE
2250 HICKORY ROAD, SUITE 300
PLYMOUTH MEETING, PA 19462-1047
MAIN (610) 834-8800 FAX (610) 834-1749
DIRECT DIAL: (610) 834-6220
EMAIL: NRAYNOR@OBRLAW.COM
August 13, 2002
Connie Reshard, Esquire, Pro Se
1101 Third Street, S.W. No. 812
Washington, D.C. 20024
RE: Reshard v. Glassner, M.D., et al.
Our File No. 87107

I enclose herewith the Interrogatories Addressed to Plaintiff, Sets I and II, and Request for Production of Documents Addressed to Plaintiff, on behalf of our client, Michael J. Glassner, M.D., in the above-captioned matter.

Kindly respond to the same in accordance with the time limits prescribed by the Pennsylvania Rules of Civil Procedure.

Very truly yours,
/s/
Nancy K. Raynor
NKR/klc
Enclosures
cc: Sharon M. Reiss, Esquire (w/enc.)

Kyle N. Thompson, Esquire (w/enc.)
John F. Schilling, M.D. (w/enc.)
Mark Scott, D.O. (w/enc.)
Geoffrey P. Tremblay, M.D. (w/enc.)
Unknown Resident c/o The Lankenau Hospital (w/enc.)

March 24, 2003 Letter to Paul Wright, Counsel Dr. Kimberly Lenhardt Deposition

March 24, 2003
VIA FACSIMILE
Paul Wright
Post & Schell PC
1800 John F. Kennedy Boulevard
19th Floor
Philadelphia, PA 19103-7480

RE: *Connie C. Reshard vs. The Lankenau Hospital, et al. U.S. District Court, Case No. 02-cv-1787*

Dear Mr. Wright:

During the deposition of Dr. Kimberly Lenhardt on March 20, 2003, you reserved the right for her to review and sign the deposition. This is to advise that I reserve the right to comment on any changes that are made on the transcript.

You did not comply with the production request accompanying the notice of oral deposition. Please advise me by C.O.B. today whether you intend to produce the documents by C.O.B. today. Otherwise I will file a motion to compel the production and request sanctions.

As I stated, I reserve the right to recall Dr. Lenhardt after you provide the production request and the completed filed of the incomplete file Dr. Lenhardt used to selectively refresh her recollection by reading into the record.

Respectfully yours,
/s/Connie C. Reshard

August 5, 2002 Letter From Counsel for Lankenau Hospital and Dr. Kimberly Lenhardt, Sharon Reiss to Petitioner

August 5, 2002
VIA FACSIMILE AND VIA MAIL
Sharon M. Reiss
Post & Schell PC
1800 John F. Kennedy Boulevard
Philadelphia, PA 19103-7480
RE: ***Connie C. Reshard vs. The Lankenau Hospital, et al. U.S . District Court, Case No. 02-cv-1787***
Dear Ms. Reiss:

I am in receipt of your letter and appearance for Main Line Hospitals Incorporated d/b/a, a/k/a Main Line Health of which The Lankenau Hospital is a member hospital, regarding the above styled case. I want a relationship of respectful decorum. Before I can make a determination as to whether or not an extension of time in which to respond to the summons and complaint (as amended) is appropriate, I need to know the amount of time involved. I must say that I am surprised that you do not have a file yet since your client began gathering a file in 2000 and more specifically in April 2002.

Also, please consider that before I can consider all of your requests, your client should provide the name of the native Oriental female resident doctor who appeared on April 8 and the morning of April 9, 2000. I would appreciate a stipulation to add the actual name of the doctor indicated as "unknown" on the complaint as amended, after your client's

identification as well as a waiver of service to your client.

Further, I would appreciate a complete, true and certified copy of all files as originally generated with respect to my association with The Lankenau Hospital. For example, the doctor referred to in the paragraph immediately above generated a discharge sheet. It too should be contained in the record. There is nothing more disrespectful to a patient, not to mention illegal, than to know that the hospital does not maintain the integrity of its records. Would it not be a wonderful world, if medical malpractice (did not exist but since it does) was just about assessing what happened based on the actual facts as they occurred and not about the reconstruction of the facts in the manner one side desires. Lets use the same set of documents on both sides.

Respectfully yours,

/s/

Connie C. Reshard

New Electronic Discovery Provisions In The United States District Court For The Eastern District Of Pennsylvania, Not Available To Petitioner

Exchange of e-discovery materials. Prior to the Rule 26(f) conference, the parties shall exchange the following information:

a. a list of the most likely custodians of relevant electronic materials, including a brief description of each person's title and responsibilities;

b. a list of each relevant electronic system that has been in place at all relevant times and a general description of each system, including the nature,

scope, character, organization, and formats employed in each system.

c. the parties should also include other pertinent information about their electronic documents and whether those electronic documents are of limited accessibility, that is, those created or used by electronic media no longer in use, maintained in redundant electronic storage media, or for which retrieval involves substantial cost;

d. the name of the individual responsible for the party's electronic document retention policies ("the retention coordinator");

e. a general description of the party's electronic document retention policies.

f. the name of the individual who shall serve as the party's "e-discovery liaison;"

g. A description of any problems reasonably anticipated to arise in connection with e-discovery.

To the extent that the state of the pleadings does not permit a meaningful discussion of the above issues by the time of the Rule 26(f) conference, the parties shall either agree on a date by which this information will be mutually exchanged or submit the issue for resolution by the court at the Rule 16 scheduling conference.

3. **E-discovery conference**. The parties shall discuss the parameters of their anticipated e-discovery at the Rule 26(f) conference and shall be prepared to address e-discovery at the Rule 16 scheduling conference with the court.

4. **E-discovery liaison**. To promote communication and cooperation between the parties, each party shall designate a single individual through whom all e-discovery requests and responses are made ("the e-discovery liaison"). Regardless of whether the e-

discovery liaison is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she must be:

a. familiar with the party's electronic systems and capabilities in order to explain these systems and answer relevant questions;

b. knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues;

c. prepared to participate in e-discovery dispute resolutions; and,

d. responsible for organizing the party's e-discovery efforts to insure consistency and thoroughness and, generally, to facilitate the e-discovery process.